

1888  
(16,467 & 16,652.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

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No. 287.

A. M. THOMAS, J. B. HART, AND H. B. OWEN, AS THE  
BOARD OF COUNTY COMMISSIONERS OF KAY COUNTY,  
OKLAHOMA TERRITORY, ET AL., APPELLANTS,

*vs.*

D. P. GAY AND A. S. REED, PARTNERS AS GAY AND  
REED, ET AL.

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FILED JANUARY 15, 1897.

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No. 439.

D. P. GAY AND A. S. REED, PARTNERS AS GAY AND  
REED, ET AL., APPELLANTS,

*vs.*

A. M. THOMAS, J. B. HART, AND H. B. OWEN, AS THE  
BOARD OF COUNTY COMMISSIONERS OF KAY COUNTY,  
OKLAHOMA TERRITORY, ET AL.

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FILED AUGUST 20, 1897.

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APPEALS FROM THE SUPREME COURT OF THE TERRITORY OF  
OKLAHOMA.

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Filed Dec. 14, 1896. Edgar W. Jones, clerk.

1 In the Supreme Court of the Territory of Oklahoma.

D. P. GAY and A. S. REED, as Partners as Gay & Reed ;  
 A. M. Miller and J. B. Johnson, as Partners as Miller  
 & Johnson; M. Halff and S. Halff, as Partners as Halff  
 Brothers; R. H. Harris, W. C. Harris, and William  
 Childers, as Partners as Harris Brothers & Childers;  
 E. T. Comer and H. C. Comer, as Partners as Comer  
 Brothers; J. H. Carney, G. M. Carpenter, Virgil Herard,  
 G. T. Hume; W. F. Smith and W. L. McCauley, as  
 Partners as Smith & McCauley; W. F. Smith, W. W.  
 Irons, A. I. Adams; A. I. Adams and Neal Shafer, as  
 Partners as Adams & Shafer; C. W. Burt, E. M.  
 Hewins, I. D. Harkleroad; Douglas Pierce and J. T.  
 Crump, as Pierce & Crump; James Stone, W. M. Hol-  
 loway, Jesse H. Pugh, R. H. Mosely, Drury Warren,  
 T. J. Moore, J. M. Slater, and R. W. Prosser, Plaintiffs  
 in Error and Defendants to Cross-petition in Error,

No. 412.

vs.

A. M. THOMAS, J. B. HART, and H. B. OWEN, as the  
 Board of County Commissioners of Kay County, Okla-  
 homa Territory; J. H. Lane, as the County Clerk of  
 Kay County, Oklahoma Territory; S. J. Smock, as  
 County Treasurer of Kay County, Oklahoma Terri-  
 tory, and H. C. Masters, as Sheriff of Kay County,  
 Oklahoma Territory, Defendants in Error and Cross-  
 petitioners in Error.

UNITED STATES OF AMERICA, { ss :  
*Territory of Oklahoma,*

Be it remembered that in the supreme court of the Territory of  
 Oklahoma, at the city of Guthrie, in said Territory, at the times  
 hereinafter mentioned, the following papers were filed and proceed-  
 ings had in the above-entitled cause, to wit: Petition in error and  
 case-made, thereto attached.

Endorsed: Filed in the supreme court, at Guthrie, Oklahoma  
 Territory, January 8th, 1896. Edgar W. Jones, clerk.

## 1a In the Supreme Court of the Territory of Oklahoma.

D. P. GAY and A. S. REED, as Partners as Gay & Reed; A. M. Miller and J. B. Johnson, as Partners as Miller & Johnson; M. Halff and S. Halff, as Partners as Halff Brothers; R. H. Harris, W. C. Harris, and William Childers, as Partners as Harris Brothers & Childers; E. T. Comer and H. C. Comer, as Partners as Comer Brothers; J. H. Carney, G. M. Carpenter, Virgil Herard, G. T. Hume; W. F. Smith and W. L. McCauley, as Partners as Smith & McCauley; W. F. Smith, W. W. Irons, A. I. Adams; A. I. Adams and Neal Shafer, as Partners as Adams & Shafer; C. W. Burt, E. M. Hewins, I. D. Harkleroad; Douglas Pierce and J. T. Crump, as Partners as Pierce & Crump; James Stone, W. M. Holloway, Jesse H. Pugh, R. H. Mosely, Drury Warren, T. J. Moore, J. H. Slater, and R. W. Prosser, Plaintiffs in Error,

vs.

A. M. THOMAS, J. B. HART, and H. B. OWENS, as the Board of County Commissioners of Kay County, Oklahoma Territory; J. H. Lane, as the County Clerk of Kay County, Oklahoma Territory; S. J. Smock, as County Treasurer of Kay County, Oklahoma Territory, and H. C. Masters, as Sheriff of Kay County, Oklahoma Territory, Defendants in Error.

# 412. Petition  
in Error.

Come now the plaintiffs in error above named, and for their cause of action in error in this court allege and aver that heretofore, in a cause pending in the district court of the county of Kay and Territory of Oklahoma, wherein the Hon. A. G. C. Bierer was presiding judge, by the consideration of said court in a certain action wherein these plaintiffs in error were plaintiffs and the defendants in error were defendants and on the 8th day of January, A. D. 1896, a certain judgment and decree was rendered and entered against these plaintiffs in error judging and decreeing that certain taxes assessed against the property of these plaintiffs in error located in the Kaw Indian reservation and in that part of the Osage Indian reservation attached to the county of Kay and Territory of Oklahoma for judicial purposes were valid and subsisting tax levies against the property of said plaintiffs, and the said court denied the relief demanded in said action to restrain the levy and collection of the said taxes herein referred to, to wit:

A county levy made by the board of county commissioners of the county of Kay and Territory of Oklahoma for the year 1895 of two and one-half mills on the dollar of valuation for court expenses and the territorial levies made for the year 1895 by the territorial board of equalization as follows, to wit:

General revenue, three mills on the dollar;  
 University fund, one-half mill on the dollar;  
 Normal school fund, one-half mill on the dollar;  
 Bond interest fund, one-half mill on the dollar;  
 Board of education fund, one-tenth mill on the dollar,

making a total of the levies so attempted to be made on the property of these plaintiffs located in said Territory attached to the county of Kay for judicial purposes of seven and one-tenth mills on the dollar of valuation, and the said court vacated and dissolved the temporary injunctions theretofore granted in favor of the said plaintiffs against the levy and collection of said taxes therein referred to and modified the said temporary injunctions and vacated the same, so far as the same affected the specific levies referred to; which said case was tried upon a demurrer to the petition of the said plaintiffs in error in the said district court of the county of Kay and Territory of Oklahoma and upon the facts stated in said petition and the relief claimed in said petition granted in part and denied in part, of which denial in part these plaintiffs in error complain, and which action of the court fully appears by a case-made, attached hereto, marked "Exhibit A;" which said case-made was duly made, served, signed, settled, attested, and filed and is hereby referred to and made a part of this petition in error.

The plaintiffs allege that there is manifest error in the proceedings of the court to the substantial prejudice of these plaintiffs in error in the following particulars, to wit:

First. The court erred in holding that the said levy of two and one-half mills for court expenses was a valid and legal levy on the property of these plaintiffs.

Second. The court erred in holding that the territorial levy of three mills for general revenue was a valid and legal levy upon the property of the said plaintiffs.

Third. The court erred in holding that the territorial levy of one-half mill on the dollar for university fund was a valid and legal levy upon the property of the said plaintiffs.

Fourth. The court erred in holding that the territorial levy of one-half mill on the dollar for normal school fund was a valid and legal levy upon the property of the said plaintiffs.

Fifth. The court erred in holding that the territorial levy of one-half mill on the dollar for bond interest fund was a valid and legal levy upon the property of the said plaintiffs.

Sixth. The court erred in holding that the territorial levy of one-tenth mill on the dollar for board of education fund was a valid and legal levy upon the property of these plaintiffs.

Seventh. The court erred in holding that the said article six of chapter forty-three of the Session Laws of Oklahoma for the Year 1895 was a valid and constitutional enactment, either in whole or in part, under the organic act of this Territory.

Eighth. The court erred in modifying and in vacating the temporary injunctions theretofore granted in the court below against

the levy and collection of a portion of the taxes so held by the court to be valid and legal tax levies on the property of said plaintiffs.

Ninth. The court erred in refusing to grant a perpetual injunction against the said levies hereinbefore referred to as upheld by the court as legal and valid tax levies on the property of the said plaintiffs.

Wherefore the said plaintiffs in error pray that this court may review the action of the court below, and that said cause be remanded with instructions to the court below to set aside the said part of the said judgment and decree denying the relief prayed for by the said plaintiffs in error in part as aforesaid, and direct the said court below to cancel and set aside the levies so erroneously upheld by the said court below, and for such other and further relief as to the court may seem equitable and just.

ASP, SHARTEL & COTTINGHAM,  
*Attorneys for Plaintiffs in Error.*

(Filed Jan. 8, 1896.

EDGAR W. JONES,  
*Clerk Sup. Court.)*

We, the undersigned, attorneys for the defendants in error, hereby waive the issuance and service of summons in error and hereby enter the voluntary appearance of the defendants in error to said petition in error.

C. A. GALBRAITH,  
*Attorney General,*  
D. L. WEIR,  
*County Attorney,*  
*Attorneys for Defendants.*

(Filed Jan. 8, 1896.

EDGAR W. JONES,  
*Clerk Sup. Court.)*

3 In the District Court of the County of Kay and Territory of Oklahoma.

D. P. GAY and A. S. REED, as Partners as Gay & Reed; A. M. Miller and J. B. Johnson, as Partners as Miller & Johnson; M. Halff and S. Halff, as Partners as Halff Brothers; R. H. Harris and W. C. Harris and William Childers, as Partners as Harris Brothers & Childers; E. T. Comer and H. C. Comer, as Partners as Comer Brothers; J. H. Carney, G. M. Carpenter, Virgil Herard, G. T. Hume; W. F. Smith and W. E. McCauley, as Partners as Smith & McCauley; W. F. Smith, W. W. Irons, A. I. Adams; A. I. Adams and Neal Shafer, as Partners as Adams & Shafer; C. W. Burt, E. M. Hewins, I. D. Harkleroad; Douglas Pierce, J. T. Crump, as Partners as Pierce & Crump; James Stone, W. M. Holloway, Jesse H. Pugh, R. H. Mosely, Drury Warren, T. J. Moore, J. M. Slater, and R. W. Prosser, Plaintiffs,

Exhibit "A."

vs.

A. M. THOMAS, J. B. HART, and H. B. OWEN, as the Board of County Commissioners of Kay County, Oklahoma Territory; J. L. Lane, as County Clerk of Kay County, Oklahoma Territory; S. J. Smock, as County Treasurer of Kay County, Oklahoma Territory, and H. C. Masters, as Sheriff of Kay County, Oklahoma Territory, Defendants.

*Case-made.*

Be it remembered that by orders duly entered in certain causes pending in the district court of the county of Kay and Territory of Oklahoma, in which petitions had been filed by the plaintiffs against the defendants to restrain the levy and collection of taxes on certain property of the said plaintiffs located and kept in the Kaw Indian reservation and in that part of the Osage Indian reservation attached to the county of Kay and Territory of Oklahoma for judicial purposes, the said causes, by an order and judgment duly entered in each, were consolidated into one cause, entitled as set out in the title to this caption, in which said causes all of the parties plaintiff appear as parties plaintiff in the title to the consolidated action as set out in the above title, and which said causes so consolidated in the action above entitled are as follows:

D. P. Gay & A. S. Reed, as partners as Gay & Reed, and others vs. S. J. Smock, as county treasurer of Kay county, and others, cause # 416;

J. H. Carney and others vs. A. M. Thomas and others, cause # 458;

E. M. Hewins vs. A. M. Thomas and others, cause # 467;

I. D. Harkleroad vs. A. M. Thomas and others, cause # 471;

Douglas Pierce and others *vs.* A. M. Thomas and others, cause # 468;

Jesse H. Pugh *vs.* S. J. Smock and others, cause # 436;

R. H. Mosely *vs.* A. M. Thomas and others, cause # 469;

Drury Warren *vs.* A. M. Thomas and others, cause # 470, and

T. J. Moore and others *vs.* S. J. Smock and others, cause # 448.

That in each of said causes before enumerated and on the 8th day of January, A. D. 1896, there was entered a certain order of consolidation; which said order, omitting the title of each case, was and is identical and is in words and figures following, to wit:

"Now, on this 8th day of January, A. D. 1896, said cause comes on to be heard upon the motion of the plaintiffs to consolidate this cause with certain other causes pending in this court of the same character, to wit, suits brought by owners of property located in the

4 Kaw Indian reservation and in that part of the Osage Indian reservation attached to the county of Kay and Territory of Oklahoma for judicial purposes, to restrain the levy and collection of taxes for the year 1895 upon such property for territorial and county purposes.

And the plaintiffs in each of said causes appearing by Messrs. Asp, Shartel & Cottingham, their attorneys, and the defendants in each of said causes appearing by Hon. C. A. Galbraith, attorney general, and Hon. David L. Weir, county attorney of Kay county, and the parties consenting in open court to such order of consolidation, and it appearing to the court upon examination of the pleadings in each of the same that they might have properly been brought in a single suit instead of several actions in the first instance, and that such order of consolidation will promote the ends of justice and prevent a multiplicity of suits, it is by the court ordered that the said motion to consolidate said causes be, and the same is hereby, sustained; and it is ordered by the court that each of said causes, to wit:

D. P. Gay and A. S. Reed, as partners as Gay & Reed, and others *vs.* S. J. Smock, as county treasurer of Kay county, and others, cause # 416;

J. H. Carney and others *vs.* A. M. Thomas and others, cause # 458;

E. M. Hewins *vs.* A. M. Thomas and others, cause # 467;

I. D. Harkleroad *vs.* A. M. Thomas and others, cause # 471;

Douglas Pierce and others *vs.* A. M. Thomas and others, cause # 468;

Jesse H. Pugh *vs.* S. J. Smock and others, cause # 436;

R. H. Mosely *vs.* A. M. Thomas and others, cause # 469;

Drury Warren *vs.* A. M. Thomas and others, cause # 470; and

T. J. Moore and others *vs.* S. J. Smock and others, cause # 448, be, and the same are hereby, consolidated in one suit, to be entitled and docketed as a separate action from each and all of the actions so consolidated, and to be given a separate docket number on the docket of this court, to wit, number 516, and in the title of said cause the names of all of the plaintiffs in each of such actions shall

appear as plaintiffs, and the names of all of the defendants in each of said actions shall appear as defendants.

And it is further considered and ordered by the court that the temporary injunctions heretofore obtained in said several causes shall be continued in force upon the separate verified petitions heretofore filed in each of said causes as and for the several affidavits for temporary injunctions filed in said causes and upon the bonds and undertakings given in each of said causes and without prejudice to the rights of the defendants to their actions for breach of the conditions of such bonds, and that said temporary injunctions shall continue to operate in the said consolidated cause with like effect as though originally procured and awarded therein, and the said plaintiffs are hereby directed and required to file instantur in said consolidated cause their petition setting up the facts upon which they rely for a recovery and the nature of their relief demanded, and the clerk of the court is hereby directed and ordered to forthwith docket the said consolidated cause in accordance with this order."

And which said order was duly made on said day and date and entered on the journal of said court in each of said causes so consolidated therein.

5 In the District Court of the County of Kay and Territory of Oklahoma.

D. P. GAY and A. S. REED, as Partners as Gay & Reed ;  
 A. M. Miller and J. B. Johnson, as Partners as Miller  
 & Johnson ; M. Halff and S. Halff, as Partners as  
 Halff Brothers ; R. H. Harris and W. C. Harris and  
 William Childers, as Partners as Harris Brothers and  
 Childers ; E. T. Comer and H. C. Comer, as Partners  
 as Comer Brothers ; J. H. Carney, G. M. Carpenter,  
 Virgil Herard, G. T. Hume ; W. F. Smith and W. L.  
 McCauley, as Partners as Smith & McCauley ; W. F.  
 Smith, W. W. Irons, A. I. Adams ; A. I. Adams and  
 Neal Shaffer, as Partners as Adams & Shaffer ; C. W.  
 Burt, E. M. Hewins, I. D. Harkleroad ; Douglas Pierce  
 and J. T. Crump, as Partners as Pierce & Crump ;  
 James Stone, W. M. Holloway, Jesse H. Pugh, R. H.  
 Mosely, Drury Warren, T. J. Moore, J. M. Slater, and  
 R. W. Prosser, Plaintiffs,

vs.

A. M. THOMAS, J. B. HART, and H. B. OWEN, as the  
 Board of County Commissioners of Kay County, Ok-  
 lahoma Territory ; J. H. Lane, as County Clerk of Kay  
 County, Oklahoma Territory ; S. J. Smock, as County  
 Treasurer of Kay County, Oklahoma Territory, and  
 H. C. Masters, as Sheriff of Kay County, Oklahoma  
 Territory, Defendants.

Petition.

Come now the said plaintiffs and for their cause of action against the said defendants allege and aver the following facts, to wit :



First. That the said defendants, A. M. Thomas, J. B. Hart, and H. B. Owen, are and were at all times hereinafter mentioned the duly elected, qualified, and acting county commissioners of the county of Kay and Territory of Oklahoma.

That the said defendant, J. H. Lane, was at all times hereinafter mentioned and is now the duly elected, qualified, and acting county clerk of the county of Kay and Territory of Oklahoma.

That the said defendant, S. J. Smock, is and was at all times hereinafter mentioned the duly elected, qualified, and acting county treasurer of the county of Kay and Territory of Oklahoma, and

That the said defendant, H. C. Masters, was at all times hereinafter mentioned and is now the duly elected, qualified, and acting sheriff of the county of Kay and Territory of Oklahoma.

That the plaintiffs D. P. Gay and A. S. Reed are and were at all times hereinafter mentioned partners, doing business under the firm name of Gay & Reed.

That the plaintiffs A. M. Miller and J. B. Johnson are and were at all times hereinafter mentioned partners, doing business under the firm name of Miller & Johnson.

That the plaintiffs M. Halff and S. Halff are and were at all times hereinafter mentioned partners, doing business under the firm name of Halff Brothers.

That the plaintiffs R. H. Harris, W. C. Harris, and William Childers are and were at all times hereinafter mentioned partners, doing business under the firm name of Harris Brother- and Childers.

That the plaintiffs E. T. Comer and H. C. Comer are and were at all times hereinafter mentioned partners, doing business under the firm name of Comer Brothers.

That the plaintiffs W. F. Smith and W. L. McCauley are and were at all times hereinafter mentioned partners, doing business under the firm name of Smith & McCauley.

That the plaintiffs A. I. Adams and Neal Shafer are and were at all times hereinafter mentioned partners, doing business under the firm name of Adams & Shafer.

That the plaintiffs Douglas Pierce and J. T. Crump are and were at all times hereinafter mentioned partners, doing business under the firm name and style of Pierce & Crump.

6 Second. That the boundaries of the said county of Kay and Territory of Oklahoma were established by the Secretary of the Interior, the said territory comprised in said county being a part of the Cherokee outlet opened to settlement on the 16th day of September, A. D. 1893, under and by virtue of the President's proclamation opening the same to settlement, and the Secretary of the Interior established the boundaries of such county as follows, to wit:

The said county is bounded on the north by the State of Kansas, on the east by the Arkansas river, on the south by the Ponca Indian reservation and by the sixth standard parallel, and on the west by the range line between ranges two and three west.

That immediately upon the opening of the said Cherokee outlet to settlement a county government was established in said Kay county



and within the boundaries herein described, and that the boundaries of said county have remained unchanged from thence until the present time.

Third. That the supreme court of the Territory of Oklahoma, on the third Monday of February, 1894, and by order duly entered on the journal of said court, attached to the said county of Kay aforesaid all of the following Indian reservations and territory, to wit:

All of the Kaw or Kansas Indian reservation and all of the Osage Indian reservation north of the township line dividing townships twenty-five and twenty-six north.

That all of said territory is without the boundaries of the said Kay county as established by the Secretary of the Interior, and that the said order of the supreme court aforesaid attached the said territory to said county of Kay for judicial purposes, and for judicial purposes only, and for no other purpose whatever, and that no other change has ever been made in the boundaries of the said county of Kay and Territory of Oklahoma, by virtue of any other authority or pretended authority whatever, than the annexation of the said Indian reservations to the said county for judicial purposes, as aforesaid, and that no extension of the boundaries of the said county of Kay have ever been made or attempted to be made by any authority whatever except the order of the supreme court of said Territory hereinbefore referred to.

Fourth. That the third Legislative Assembly of the Territory of Oklahoma, by the act approved March 5th, 1895, being article six of chapter forty-three of the Session Laws of said Territory for the year 1895, attempted to provide for the assessment and taxation in Oklahoma of cattle kept and grazed and any other personal property situated in any unorganized country, district or reservation in the county to which such country, district or reservation is attached for judicial purposes.

That, in pursuance of said act of the Legislative Assembly of said Territory, the board of county commissioners of said county of Kay appointed a special assessor for the purpose of assessing all of the personal property in said Kaw Indian reservation and in said Osage Indian reservation north of said township line, and the said assessor did by virtue of such appointment assess all of the personal property in the said territory so attached to the said county of Kay for judicial purposes, and returned to the county clerk of said county an assessment-roll of the property by him attempted to be assessed in said territory attached to said county of Kay for judicial purposes.

Fifth. That none of the plaintiffs in this action have at any time owned any personal property whatever situated or located within the county of Kay and Territory of Oklahoma, according to the proper boundaries thereof.

That the said territory attached to the said county of Kay and Territory of Oklahoma for judicial purposes comprises the Kaw or Kansas Indian reservation and a part of the Osage Indian reservation, and is comprised wholly of lands owned, paid for, and occupied by said Indian tribes, and consist principally of wild, unim-

proved, and unallotted lands, which said wild, unimproved, and unallotted lands which were not needed for allotment have been leased to these plaintiffs for grazing purposes by the Osage and Kaw Indian tribal governments, under the supervision of the agent in charge of said tribes and with the ratification and approval of the Commissioner of Indian Affairs and of the Secretary of the Interior, for grazing purposes, as provided by act of Congress.

That these plaintiffs, during the year 1895 and during the month of April of said year, at the commencement of the grazing season,

drove, transported, and shipped to the ranges and pastures  
7 in said Indian reservations large herds and quantities of cattle, which were taken onto said reservations in pursuance of and by virtue and authority of said leases with the said Indian tribes, together with other articles of personal property necessary and needful in herding, grazing, and caring for said cattle, and that the said plaintiffs did not at any time have any other personal property during the year 1895 upon said Indian reservations aforesaid and within said territory attached to said county of Kay for judicial purposes than is hereinbefore set forth, and the said cattle hereinbefore referred to is the same identical property upon which the taxes herein complained of are attempted to be levied.

That the plaintiffs are all residents of the State of Kansas, the State of Texas, and other States, all of the said plaintiffs are non-residents of the territory of Oklahoma, and that the greater portion of said property was, for the year 1895, valued and assessed by the authorities of the States from whence the same was removed to the said Osage and Kaw Indian reservations prior to its removal to the said territory attached to the said Kay county, as aforesaid, for judicial purposes, and that such property of these plaintiffs, in pursuance of such assessment and valuation in the States from whence the same was removed to said Indian reservations, was duly taxed for the year 1895, and that such taxes are a valid and subsisting charge against the plaintiffs and each of them personally and against all of the property and estates of the plaintiffs located in such foreign States, and are enforceable against the estates and property of the said plaintiffs located within the jurisdiction of such other States and Territories, and said taxes can and will be collected from the property and estates of the plaintiffs located therein.

That none of said property of these plaintiffs was in Kay county, nor was the greater portion thereof within the said Territory attached to said Kay county for judicial purposes at the time when other property in Kay county was valued for taxation, to wit, the first day of February, A. D. 1895, but that the greater part of the property of the said plaintiffs attempted to be valued and assessed by the authorities of said county of Kay and Territory of Oklahoma was located and removed into the said territory attached to said Kay county for judicial purposes after the first day of April, A. D. 1895, and before the first day of May, A. D. 1895.

That the said cattle, by reason of natural growth and increase in the market value and improvement in their condition, had greatly and substantially improved and increased in value between the first day

of February, A. D. 1895, and the first day of May, A. D. 1895; that the same class and kind of property located in said Kay county, and also located and kept throughout the Territory of Oklahoma during the same period improved and increased in value likewise and to the same extent, and that the same class of property located in said Territory did, during such period, greatly and substantially increase in value between such dates and during the same time.

Sixth. That the said special assessor assessed and valued the property of these plaintiffs, so located on said territory attached to said county of Kay and Territory of Oklahoma for judicial purposes as aforesaid, and assessed the same and returned the same upon said assessment-roll hereinbefore referred to at a total valuation of \$760,469.00.

That thereafter the said sum was, by the clerk of said county, unlawfully and without authority, carried into the aggregate assessment for said county and by him certified to the auditor of said Territory.

That thereafter the territorial board of equalization, in acting upon the various assessments for the various counties as certified to said board, raised the aggregate valuation of the property in said county of Kay and Territory of Oklahoma thirty-five per cent., and the county clerk of said county unlawfully carried out the said raised valuation so certified to him by said territorial board of equalization against the property of these plaintiffs an aggregate valuation of \$1,026,634.00 as the valuation of their said property.

A schedule showing the amount for which each of these plaintiffs were assessed by the said special assessor and the valuation of each individual assessment of these plaintiffs, as extended by the county clerk, on account of the action of the territorial board of equalization, and the amount of taxes levied and extended against the property of each of these plaintiffs, is as follows:

8	Name of plaintiff.	Valuation as fixed by special assessor.	Valuation as fixed by Ter. board.	Amount of taxes extended.
	D. P. Gay and A. S. Reed, partners as Gay & Reed.....	\$123,800	\$167,130	\$4,278 53
	A. M. Miller and J. B. Johnson, as partners as Miller & Johnson .....	22,190	29,957	766 90
	M. Halff and S. Halff, as partners as Halff Brothers.....	85,790	115,817	2,964 92
	R. H. Harris, W. C. Harris, and William Childers, as partners as Harris Brothers & Childers .....	61,950	83,633	2,241 00
	E. T. Comer and H. C. Comer, as partners as Comer Brothers .....	52,435	70,787	1,812 00
	Jesse H. Pugh.....	17,105	23,092	591 16
	J. H. Carney .....	19,340	26,109	668 39
	G. M. Carpenter .....	40,172	54,232	1,388 34
	Virgil Herard.....	51,675	69,761	1,785 98
	G. T. Hume.....	59,970	80,690	2,065 66
	W. F. Smith and W. L. McCauley, as partners as Smith & McCauley.....	8,030	10,840	277 50
	W. F. Smith .....	624	842	21 55
	W. W. Iron.....	6,750	9,113	233 29
	G. W. Burt .....	25,945	35,026	896 66
	A. I. Adams... ..	6,600	8,100	207 36
	A. I. Adams and Neal Shafer, partners as Adams & Shafer.	29,705	40,102	1,026 61
	E. M. Hewins .....	18,520	25,002	640 05
	Douglas Pierce and J. T. Crump, as partners as Pierce & Crump.	6,445	8,700	222 72
	James Stone .....	14,440	19,494	499 04
	W. M. Holloway.....	8,840	11,934	305 51
	R. H. Mosely.....	41,125	57,125	1,462 40
	Drury Warren .....	8,200	11,070	283 39
	T. J. Moore .....	42,315	57,125	1,462 40
	J. M. Slater ... ..	13,820	18,657	477 62
	R. W. Prosser .....	14,050	18,968	485 59
	I. D. Harkleroad.... ..	2,400	3,240	82 94

That the said valuation and assessment of the said special assessor of the property situated in said territory attached to the

county of Kay and Territory of Oklahoma for judicial purposes was made on the first day of May, A. D. 1895.

Seventh. That thereafter the territorial board of equalization levied and duly certified to the county clerk of the county of Kay and Territory of Oklahoma tax levies for territorial purposes for the year 1895 as follows, to wit:

General revenue, three mills on the dollar;  
University fund, one-half mill on the dollar;  
Normal school fund, one-half mill on the dollar;  
Bond interest fund, one-half mill on the dollar;  
Board of education fund, one-tenth mill on the dollar;

9 making a total of four and six-tenths mills on each dollar of valuation for the purpose of taxation, levied by the territorial board of equalization for territorial purposes.

That thereafter the board of county commissioners of the county of Kay and Territory of Oklahoma made the following levies for the year 1895, to wit:

For salaries, five mills on the dollar;  
For contingent expenses, three mills on the dollar;  
For sinking fund, one and one-half mills on the dollar;  
For court expenses, two and one-half mills on the dollar;  
For county supplies, three mills on the dollar;  
For road and bridge fund, two mills on the dollar;  
For poor fund of said county, one mill on the dollar;  
For county school purposes, three mills on the dollar;

making a total, for county purposes, of twenty-one mills on the dollar of valuation, levied in said county for the year 1895, by the board of county commissioners of said county, for county purposes.

That the county clerk of said county of Kay and Territory of Oklahoma carried the valuations of the property of these plaintiffs on the tax-rolls of said county and extended against the same, according to the county and territorial levies aforesaid, and charged to the same taxes in the aggregate sum of \$26,174.16 for the year 1895. A detailed statement showing the amount of taxes charged against these plaintiffs and each of them is fully set forth in the above schedule.

Eighth. The plaintiffs allege that the action of the territorial board of equalization in attempting to raise the valuation of the property of these plaintiffs, and the action of the county clerk in attempting to extend the same, and such raised valuation on the tax books of said county against these plaintiffs is null and void in this, to wit:

First. That said board has no power or jurisdiction to alter the assessment of property made or attempted to be made in such unorganized territory and reservations attached to the counties of the Territory of Oklahoma for judicial purposes.

Second. Because the attempted raise so made by said territorial board of equalization aforesaid, was not an equalization, but was an attempt upon the part of the said territorial board of equalization to make an assessment which they thought would conform nearer to the value of the property in said Territory than that made by

the local assessor; that the territorial board of equalization raised the aggregate valuation of all the counties in said Territory except the county of Kingfisher, which they permitted to remain in the aggregate as returned to said board by the county clerk of said county and adopted the rate of valuation in Kingfisher county as their standard of valuation for all of the counties of the Territory, and raised the aggregate valuation of the other counties from five to seventy-five per cent. to bring the valuation up to what they conceived to be the standard adopted in said Kingfisher county, and which action on the part of said territorial board of equalization the said plaintiffs allege to be wholly unauthorized and void.

Ninth. The plaintiffs allege and aver that all the proceedings looking to the assessment and taxation of these plaintiffs are null and void for the following reasons, to wit:

(1.) Because the said article six (6) is local and special legislation; that by the laws of said Territory the property of the residents of the counties in said Territory is assessed and valued at its value on the first day of February in each year, whereas, the property of these plaintiffs located in said unorganized country attached to said county of Kay for judicial purposes, is valued as of the first day of May, at a time when it possesses substantially a greater value than the same class of property possesses on the first day of February.

(2.) Because personal property which is brought into any organized county of the Territory after the first day of February and before the first day of September is not taxable if the same shall have been assessed for taxation in some other State or Territory for that year; whereas, the property of these plaintiffs that was brought into said unorganized country from other States and Territories after the 1st day of February and after having been assessed for the year 1895 for taxation, is taxed regardless of the fact that it has already been taxed for the year 1895 in the States and Territories from whence it was brought.

That the said act makes an unequal discrimination in taxing different kinds of personal property, in violation of the organic act of this Territory.

That the said Osage and Kaw Indian reservations are not now and never have been a part of the county of Kay or a part of the Territory of Oklahoma for the purposes of taxation; that the residents of said Indian reservation do not receive from said Kay county any police or other protection.

That the said Indian reservations are not a part of said county; that the residents of said Indian reservations have no voice in creating the indebtedness for which said taxes are levied to pay; that they have no voice in the election of the officers for the payment of whose salaries said levies are made; that they have no voice or benefit from the contingent fund of said county and for which the three mills' levy is made; that they have no voice in the creation of the indebtedness and derive no benefit from such debt for which the sinking fund is provided in said county.

That they have no protection from the court expenses incurred in said county and no voice in its expenditure; that the said Kay



county does not furnish to the residents of said Indian reservations any court facilities other than such as are furnished to citizens of other States and Territories, and that the levy of two and one-half mills made for that purpose is entirely without any benefit to the residents of said Indian reservations; that they have no interest in the county supplies or other county levies.

That they do not participate in the benefit of the schools of said county of Kay nor the construction of roads and bridges therein, nor do they receive any benefit or have any voice in the expenditure of the poor fund of said Kay county, nor do the residents of the said Indian reservations derive any benefits from the said poor fund, as the same is wholly expended for the use and benefit of the residents of the said Kay county.

That the said act is illegal in that it attempts to tax the property situated in said Indian reservations for the benefit of the residents of said Kay county, and that all of said taxes are illegal and void and are unjust discriminations and exactions upon the residents of said Osage Indian reservation and said Kaw Indian reservation for the benefit of the residents of said Kay county and of said Territory.

That the said act is void and unconstitutional in this: It is in violation of the organic act of said Territory of Oklahoma in this, to wit, that it only provides for the assessment and taxation of cattle kept and grazed and other personal property situated in said Osage Indian reservation and Kaw Indian reservation and other Indian reservations, and does not provide for the taxation of real estate or of any personal property, save and except cattle and other tangible personal property, and the said law, by reason thereof, is a discrimination in taxation between different kinds of personal property in that it exempts from taxation all real estate and choses in action and credits situated and located in said unorganized territory and reservations attached to organized counties for judicial purposes.

That there was in said Indian reservations at the time of the passage of said act and on the first day of May and is now large quantities of real estate and rights of way and station grounds of railroad companies of great value that are real estate, together with choses in action, credits, and other intangible property that under the provisions of said act are not taxable and cannot be taxed.

That the said Osage Indian reservation and the said Kaw Indian reservation are not properly a part of the Territory of Oklahoma for the purpose of taxation for territorial purposes, nor do the residents of said Indian reservation participate in the benefits of the territorial government, but that the said taxation throughout is taxation for a private, and not for a public, use and is an illegal and unequal exaction, not in behalf of and for the use and benefit of the Territory of Oklahoma and the courts therein, but is exacted for the private use and benefit of the residents of said Territory.

11 That the property of these plaintiffs was taken into said reservations under and by virtue of leases executed by said Indian tribes, by and through the Indian agent as aforesaid, under

the provisions of the laws of Congress, and approved by the Secretary of the Interior and the Commissioner of Indian Affairs, and that such taxes attempted to be levied on the property of these plaintiffs will result directly in impairing the power of the said Indians to lease their said lands, and will impair the revenue derived therefrom, and will operate as a tax upon the said Indians.

Tenth. That the said defendants have extended their levies, against the valuation of the property of these plaintiffs, as hereinbefore set out, and at the date of the commencement of this suit were threatening to and would, except for the temporary injunctions heretofore granted in the various causes consolidated herein, have issued tax warrants and other process for the seizure of the property of the said plaintiffs and the collection of said taxes, and that the said defendants will, unless perpetually enjoined therefrom, attempt to collect and collect the said unlawful taxes as aforesaid from the property of the said plaintiffs.

Wherefore the said defendants pray that the temporary injunction heretofore granted be continued in force, and that the said defendants and each of them be perpetually enjoined from collecting or attempting to collect any of the said taxes so attempted to be assessed against the property of these plaintiffs, and that they may recover the costs of their several actions consolidated herein, and for such other and further relief as to the court may seem equitable and just.

ASP, SHARTEL & COTTINGHAM,

*Attorneys for Plaintiffs.*

TERRITORY OF OKLAHOMA, } ss:  
           *Kay County,*

Henry E. Asp, of lawful age, being first duly sworn, upon his oath deposes and says that he is one of the attorneys for plaintiffs; that he has read the above and foregoing petition and know- the statements and allegations therein contained, and that the same are true in substance and in fact, as he is informed and verily believes, and that the said plaintiffs are each absent from said county.

HENRY E. ASP.

Sunscribed in my presence and sworn to before me this 8th day of January, A. D. 1896.

[SEAL.]

JNO. H. HAVIGHORST,

*Clerk of the District Court of Kay County,  
                                   Oklahoma Territory.*

And thereupon said cause is duly docketed by the clerk of said court.

And afterwards and on the 8th day of January, A. D. 1896, the same came on to be heard, and the defendants filed their demurrer in said cause; which said demurrer is in words and figures following, to wit:



"In the District Court of the County of Kay and Territory of Oklahoma.

D. P. GAY and A. S. REED, as Partners as Gay & Reed ;  
 A. M. Miller & J. B. Johnson, as Partners as Miller &  
 Johnson ; M. Halff and S. Halff, as Partners as Halff  
 Brothers ; R. H. Harris and W. C. Harris and William  
 Childers, as Partners as Harris Brothers & Childers ;  
 E. T. Comer and H. C. Comer, as Partners as Comer  
 Brothers ; J. H. Carney, G. M. Carpenter, Virgil  
 Herard, G. T. Hume ; W. F. Smith and W. L. Mc-  
 Cauley, as Partners as Smith & McCauley ; W. F.  
 Smith, W. W. Irons, A. I. Adams ; A. I. Adams and  
 Neal Shafer, as Partners as Adams & Shafer ; C. W.  
 Burt, E. M. Hewins, I. D. Harkleroad ; Douglas Pierce  
 and J. T. Crump, as Partners as Pierce & Crump ;  
 James Stone, W. M. Holloway, Jesse H. Pugh, R. H.  
 Mosely, Drury Warren, T. J. Moore, J. M. Slater, and  
 R. W. Prosser, Plaintiffs,

Demurrer.

vs.

12 A. M. THOMAS, J. B. HART and H. B. OWEN, as  
 The Board of County Commissioners of Kay  
 County, Oklahoma Territory ; J. H. Lane, as County  
 Clerk of Kay County, Oklahoma Territory ; S. J.  
 Smock, as County Treasurer of Kay County, Okla-  
 homa Territory, and H. C. Masters, as Sheriff of Kay  
 County, Oklahoma Territory, Defendants.

Come now the defendants and each of them for himself and de-  
 murs to the petition of the plaintiffs filed herein and to the relief  
 demanded by the said plaintiffs and each of them, jointly and sever-  
 ally, for the reason that the said petition fails to state facts sufficient  
 to constitute a cause of action in favor of said plaintiffs or either of  
 them and against the said defendants or either of them.

C. A. GALBRAITH,  
*Attorney General, and*  
 D. L. WEIR,  
*County Attorney.*

Afterwards and on the 8th day of January, A. D. 1896, said cause  
 came on for trial in its regular order upon the said demurrer and  
 the following proceedings were had, to wit :

In the District Court of the County of Kay and Territory of  
Oklahoma.

D. P. GAY and A. S. REED, as Partners as Gay & Reed; A. M. Miller and J. B. Johnson, as Partners as Miller & Johnson; M. Halff and S. Halff, as Partners as Halff Brothers; R. H. Harris and W. C. Harris and William Childers, as Partners as Harris Brothers & Childers; E. T. Comer and H. C. Comer, as Partners as Comer Brothers; J. H. Carney, G. M. Carpenter, Virgil Herard, G. T. Hume; W. F. Smith and W. L. McCauley, as Partners as Smith & McCauley; W. F. Smith, W. W. Irons, A. I. Adams; A. I. Adams and Neal Shafer, as Partners as Adams & Shafer; C. W. Burt, E. M. Hewins, I. D. Harkleroad; Douglas Pierce and J. T. Crump, as Partners as Pierce & Crump; James Stone, W. M. Holloway, Jesse H. Pugh, R. H. Mosely, Drury Warren, T. J. Moore, J. M. Slater, and R. W. Prosser, Plaintiffs,

} Journal Entry.

vs.

A. M. THOMAS, J. B. HART, and H. B. OWEN, as the Board of County Commissioners of Kay County, Oklahoma Territory; J. H. Lane, as County Clerk of Kay County, Oklahoma Territory; S. J. Smock, as County Treasurer of Kay County, Oklahoma Territory, and H. C. Masters, as Sheriff of Kay County, Oklahoma Territory, Defendants.

Now, on this 8th day of January, A. D. 1896, said cause comes on to be heard and tried in its regular order upon the demurrer of the defendants to the petition of the plaintiffs, and the various plaintiffs above named appearing by Messrs. Asp, Shartel & Cottingham, their attorneys, and the defendants above named appearing by Hon. C. A. Galbraith, attorney general, and Hon. David L. Weir, county attorney of Kay county, their attorneys; which said demurrer, by consent of parties in open court, is carried to the relief demanded in whole or in part, and by further agreement of parties said cause is submitted to the final consideration of said court upon the said demurrer and upon the said petition, and it is agreed between the parties in open court that the court may render final judgment, subject to exceptions and appeal, upon the law as applied to the facts stated in said petition, granting to the said plaintiffs any or all relief to which they may be entitled under the allegations of said petition and denying to the said plaintiffs any or all relief to which the court may be of the opinion under the law the said plaintiffs are not entitled, neither of the parties waiving any of their substantial rights further than to submit the whole controversy to the court for such determination as is warranted under the law

and the facts stated in said petition, disregarding the sufficiency or insufficiency of the questions involved by demurrer.

13 And thereupon said cause is duly argued to the court by counsel and submitted to the consideration of the court; and the court, after hearing the argument and being duly advised in the premises, sustains the said demurrer in part and overrules the same in part in the following particulars, to wit:

It is the opinion of the court that the said property located in the Kaw Indian reservation and in that part of the Osage Indian reservation attached to the county of Kay for judicial purposes is not subject to taxation in the said county of Kay for either or any of the following county purposes, to wit:

For salaries, for contingent fund, for sinking fund, for county supplies, for road and bridge fund, for county poor fund, and for county school fund, for which total levies are shown by said petition to have been made against the property of said plaintiffs located in said Indian reservations as aforesaid of eighteen and one-half mills, which levies so attempted to be made against the property of the said plaintiffs for the year 1895, is hereby adjudged to be null and void.

The court is of the opinion that the following county and territorial levies attempted to be extended against the property of the plaintiffs in this action for the year 1895 are valid and legal, to wit:

For court expenses, two and one-half mills, and for territorial revenue, four and six-tenths mills, and that said property is subject to taxation for the year 1895 for such purposes.

To which said finding and adjudication of the court, holding said property of said plaintiffs not subject to taxation for the purposes hereinbefore named, the said defendants and each of them duly excepted and except; and to which said ruling of the court, holding the said levy of two and one-half mills for court expenses and four and sixth-tenths mills for territorial revenue valid and legal, the plaintiffs and each of them duly excepted and except.

It is further by the court considered, ordered, adjudged, and decreed that the said plaintiffs do have a perpetual injunction, and that the said defendants and each of them, and the successors and agents and each of them, be forever and perpetually restrained and enjoined from either levying or collecting or attempting to levy or collect either or any of the following-named taxes for the year 1895, to wit:

For salaries, five mills.

For contingent fund, three mills.

For sinking fund, one and one-half mills.

For county supplies, three mills.

For road and bridge fund, two mills.

For poor fund of said county, one mill.

For county school fund, three mills.

And that said defendants and each of them be forever and perpetually enjoined from levying or attempting to levy or collecting or attempting to collect either or any part or parcel of the tax levies above described.

It is by the court considered, ordered, adjudged, and decreed that the prayer of the plaintiffs for a perpetual injunction as to the following portions of said tax levies for 1895 be, and they are hereby, denied, to wit:

The county levy of two and one-half mills for court expenses and the territorial levies as follows: For general revenue, three mills; for university fund, one-half mill; for normal school fund, one-half mill; for bond interest fund, one-half mill; for board of education fund, one-tenth mill, and that the temporary injunction heretofore granted in this cause against the levy and collection of such portions of the tax levied and assessed against the property of the plaintiffs be, and the same are hereby, vacated, dissolved, and held for nought, and that the extension of a tax levy against the property of the said plaintiffs assessed in the Kaw Indian reservation and in that part of the Osage Indian reservation attached to Kay county for judicial purposes be duly extended against said property and collected of the said plaintiffs as follows, to wit:

14	Name of plaintiff.	Valuation as fixed by Ter. board.	Extension under order of court.
	D. P. Gay and A. S. Reed, as partners as Gay & Reed .....	\$167,130	\$1,186 62
	A. M. Miller and J. B. Johnson, as partners as Miller & Johnson .....	29,957	212 69
	M. Halff and S. Halff, as partners as Halff Brothers. ....	115,817	822 30
	R. H. Harris, W. C. Harris, and Wm. Childers, as partners as Harris Brothers & Childers .....	83,633	593 79
	E. T. Comer and H. C. Comer, partners as Comer Brothers.....	70,787	502 59
	Jesse H. Pugh.....	23,092	163 95
	J. H. Carney .....	26,109	185 37
	G. M. Carpenter .....	54,232	385 05
	Virgil Herard .....	69,761	495 09
	G. T. Hume .....	80,690	572 90
	W. F. Smith and W. L. McCauley, as partners as Smith & McCauley .....	10,840	76 96
	W. F. Smith.....	842	5 98
	W. W. Irons.....	9,113	64 70
	C. W. Burt.....	35,026	248 68
	A. I. Adams.....	8,100	57 51
	A. I. Adams and Neal Shafer, as partners as Adams & Shafer .....	40,102	284 72
	E. M. Hewins.....	25,002	177 51

Name of plaintiff.	Valuation as fixed by Ter. board.	Extension under order of court.
Douglas Pierce and J. T. Crump, as partners as Pierce & Crump.....	\$8,700	\$61 77
James Stone.....	19,494	138 40
W. M. Holloway.....	11,934	84 73
R. H. Mosely.....	57,125	405 59
Drury Warren.....	11,070	78 60
T. J. Moore.....	57,125	405 59
J. M. Slater.....	18,657	132 46
R. W. Prosser.....	18,968	134 67
I. D. Markleroad.....	3,240	23 00

And that the said defendants may proceed to levy and collect against the property of said defendants, without restraint, the several amounts of taxes shown in the foregoing statement.

To which order, judgment, and decree of the court granting said perpetual injunction against the levy and collection of certain taxes attempted to be levied and extended against the property of said plaintiffs and each and every part of said order the said defendants and each of them duly excepted and except; and to which said order, judgment, and decree of the court holding a part of said taxes legal and valid and denying a perpetual injunction against their levy and collection, and to said order vacating said temporary injunction heretofore granted, in part, and to each and every part of said order, judgment, and decree the said plaintiffs and each of them duly excepted and except; which said exceptions by the said plaintiffs and defendants are allowed by the court, and by the court directed to be entered of record in said cause.

15 And thereupon the said plaintiffs ask the court to fix a time within which they may file their petition in error in the supreme court of the Territory of Oklahoma to review the order and judgment of this court vacating and modifying the temporary injunction heretofore granted in their behalf, and the court, being duly advised in the premises, orders that the said plaintiffs shall file their petition in error in the supreme court of said Territory on or before the 13th day of January, A. D. 1896, and pending the filing of said petition in error and until the date fixed the judgment and order modifying said temporary injunction shall remain inoperative, and in case said plaintiffs in error shall file their petition in error to review said order and judgment within the time limited, then the operation of said order modifying and vacating said temporary injunction shall remain inoperative pending the final disposition thereof in the supreme court of said Territory.

It is further considered, ordered, and adjudged by the court that the costs in this action be divided between the parties hereto, the plaintiffs to pay three-tenths of the same and the defendants seven-tenths thereof.

Dated this 8th day of January, A. D. 1896.

A. G. C. BIERER,  
*Judge of the District Court of Kay  
County, Oklahoma Territory.*

The above and foregoing case-made presents all of the material matters upon which the above and foregoing case was tried, the same having been decided and judgment rendered upon the facts stated in the petition filed in said consolidated case.

Service of the above and foregoing case-made is hereby accepted this eighth day of January, A. D. 1896, and time to suggest amendments is waived, and we hereby consent that the same may be presented to the court at this time for signing and settlement.

C. A. GALBRAITH,  
D. L. WEIR,  
*Attorneys for Defendants.*

16 In the District Court of the County of Kay and Territory of Oklahoma.

D. P. GAY and A. S. REED, as Partners as Gay & Reed; A. M. Miller and J. B. Johnson, as Partners as Miller & Johnson; M. Halff and S. Halff, as Partners as Halff Brothers; R. H. Harris and W. C. Harris and William Childers, as Partners as Harris Brothers and Childers; E. T. Comer and H. C. Comer, as Partners as Comer Brothers; J. H. Carney, G. M. Carpenter, Virgil Herard, G. T. Hume; W. F. Smith and W. L. McCauley, as Partners as Smith & McCauley; W. F. Smith, W. W. Irons. A. I. Adams; A. I. Adams and Neal Shafer, as Partners as Adams & Shafer; C. W. Burt, E. M. Hewins, I. D. Harkleroad; Douglas Pierce and J. T. Crump, as Partners as Pierce & Crump; James Stone, W. M. Holloway, Jesse H. Pugh, R. H. Mosely, Drury Warren, T. J. Moore, J. M. Slater, and R. W. Prosser, Plaintiffs,

*vs.*

A. M. THOMAS, J. B. HART, and H. B. OWEN, as the Board of County Commissioners of Kay County, Oklahoma Territory; J. H. Lane, as County Clerk of Kay County, Oklahoma Territory; S. J. Smock, as County Treasurer of Kay County, Oklahoma Territory, and H. C. Masters, as Sheriff of Kay County, Oklahoma Territory, Defendants.

*Order.*

Now, on this 8th day of January, A. D. 1896, is presented to me, the undersigned judge of the above-named court, being the same

judge who tried the above-entitled cause, the above and foregoing case-made for signing and settlement, and after examining the proof of service I find that the attorneys for defendants have waived the suggestion of amendments and the time to suggest amendments, and having consented in writing that the cause may be signed and settled at this time, and after having carefully examined the above and foregoing case-made, I find that the same speaks the truth with reference to the proceedings set out therein.

And it is therefore by me ordered that the same be, and the same is hereby, settled and signed as the case-made in said cause.

And it is further by me ordered that the clerk of said court do sign and attest said case-made and file the same in said cause as the case-made therein.

In witness whereof I have hereto set my hand this 8th day of January, A. D. 1896.

A. G. C. BIERER,  
*Judge of the District Court of Kay  
County, Oklahoma Territory.*

Attest: JNO. H. HAVIGHORST,

[SEAL.] *Clerk of the District Court of Kay  
County, Oklahoma Territory.*

The above and foregoing case-made filed in the district court of the county of Kay and Territory of Oklahoma this 8th day of January, A. D. 1896.

JNO. H. HAVIGHORST,  
[SEAL.] *Clerk of the District Court of Kay  
County, Oklahoma Territory.*

Endorsement: # 412. In the district court of Kay county, Oklahoma Territory. D. P. Gay and A. S. Reed, as partners as Gay & Reed, *et al.*, plaintiffs, vs. A. M. Thomas *et al.*, defendants. Case-made. Filed Jan. 8th, '96. Edgar W. Jones, clerk supreme court.



## 17 In the Supreme Court, Territory of Oklahoma.

D. P. GAY and A. S. REED, as Partners as Gay & Reed ; A. M. Miller and J. B. Johnson, as Partners as Miller & Johnson ; M. Halff and S. Halff, as Partners as Halff Brothers ; R. H. Harris and W. C. Harris and William Childers, as Partners as Harris Brothers & Childers ; E. T. Comer and H. C. Comer, as Partners as Comer Brothers ; J. H. Carney, G. M. Carpenter, Virgil Herard, G. T. Hume ; W. F. Smith and W. L. McCauley, as Partners as Smith & McCauley ; W. F. Smith, W. W. Irons, A. I. Adams: A. I. Adams and Neal Shaffer, as Partners as Adams & Shafer ; C. W. Burt, E. M. Hewins, I. D. Markleroad ; Douglas Pierce and J. T. Crump, as Partners as Pierce & Crump ; James Stone, W. M. Holloway, Jesse H. Pugh, R. H. Mosely, Drury Warran, T. J. Moore, J. M. Slater, and R. W. Prosser, Plaintiffs in Error,

Cross-petition  
in Error.

vs.

A. M. THOMAS, J. B. HART, and H. B. Owne, as the Board of County Commissioners of Kay County, Oklahoma Territory ; J. H. Lane, as County Clerk of Kay County, Oklahoma Territory ; S. J. Smock, as County Treasurer of Kay County, Oklahoma Territory, and H. C. Masters, as Sheriff of Kay County, Oklahoma Territory, Defendants in Error.

Come now the defendants in error herein and for their cross-petition in error allege that by the case-made in this cause by the plaintiffs in error there appears manifest error against the substantial rights of these defendants in the following particulars, to wit :

First. The court erred in holding that the county levies of—

For salaries, five mills on the dollar ;

For contingent expenses, three mills on the dollar ;

For sinking fund, one and one-half mills on the dollar ;

For county supplies, three mills on the dollar ;

For road and bridge fund, two mills on the dollar ;

For poor fund, one mill on the dollar ; and

For county school purposes, three mills on the dollar, were illegal.

Second. The court erred in granting a perpetual injunction against the levy and collection of the said levies hereinbefore referred to an- each of them.

Third. The court erred in holding that the said territory so attached to the county of Kay and Territory of Oklahoma for judicial purposes was no part of said county for taxation for the county purposes hereinbefore enumerated and each of the same.

Wherefore the said defendants in error pray that the action of



the said district court in granting the perpetual injunction against such levies and each of the same and in holding the same to be illegal and void be reviewed and reversed and the said cause remanded with instructions to enter judgment in favor of said defendants in error upon the said petition for an injunction denying the said perpetual injunction and dissolving the temporary injunctions theretofore granted in said cause, and for such other and further relief as to the court may seem equitable and just.

D. L. WEIR,

*County Attorney,*

C. A. GALBRAITH,

*Attorney General,*

*Attorneys for Defendants in Error.*

Endorsed: Cross-petition in error. Filed in the supreme court, at Guthrie, Oklahoma Territory, January 8th, 1896. Edgar W. Jones, clerk.

18 In the Supreme Court of Oklahoma Territory, Regular June Term, 1896.

D. P. GAY and A. S. REED, as Partners as Gay & Reed, <i>et al.</i> ,	}
<i>vs.</i>	
A. M. THOMAS, J. B. HART, and H. B. OWEN, as the Board of County Commissioners of Kay County, Oklahoma Territory, <i>et al.</i>	

And now, to wit, on this the fifth day of June, A. D. 1896, this cause coming on the regular call of the docket for hearing, both on the petition in error and cross-petition in error, was argued by Henry E. Asp, John W. Shartel, Horace Speed, and W. W. Flood for plaintiffs in error and by Mr. Attorney General Galbraith and D. L. Weir, Esq., for defendants in error and cross-petitioners, was submitted and taken under advisement.

19 Regular June Term, 1896.

D. P. GAY and A. S. REED, as Partners as Gay & Reed, <i>et al.</i> ,	}
<i>vs.</i>	
A. M. THOMAS, J. B. HART, and H. B. Owen, as the Board of County Commissioners of Kay County, Oklahoma Territory, <i>et al.</i>	

Error from Kay County.

SEPTEMBER 4TH, 1896.

This cause having been heretofore argued and submitted, and the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged that the judgment of the district court therein be, and the same is hereby, in all things affirmed and the prayer of the petition in error and cross-petition in error denied; to which plaintiffs and defendants each and both severally except. Exceptions allowed.

## 20 In the Supreme Court of the Territory of Oklahoma.

D. P. GAY *et al.* }  
                                   *vs.* }  
 A. M. THOMAS *et al.* }

1. **Taxation—Power of legislature in imposing, extent of.**—The power of taxation is not an arbitrary power, nor can it be exercised capriciously. It is hedged about and restricted by wise constitutional limitations and fixed general rules. These constitutional limitations and general rules are designed to secure a just apportionment of the burdens of government by requiring uniformity of contributions, levied by fixed and general rules and apportioned by the law, according to some uniform measure of equality. Within these rules and limitations the authority and power of the legislative department is absolute and conclusive.
2. **Taxation—Legislative discretion in.**—The discretion of the legislature in matters of taxation is very broad and its exercise may work injustice and oppression. The judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively, but if it does not clearly violate some established rule or limitation the responsibility of the legislature is not to the courts but to the people by whom its members are elected. The courts can only interfere when the conclusion is unavoidable that the legislature has transcended its powers or clearly violated some constitutional or other fixed general rule defining or limiting such powers.
3. **Indian reservations—Taxation of property therein.**—In the absence of any provisions or stipulations in the treaties by which the Indians were settled on the reservations in this Territory that the lands in such reservations should not, without the consent of the Indians occupying them, be included within the limits or jurisdiction of any State or Territory that might thereafter be created and which should include such reservation within its exterior boundaries the authority of the Territory may extend over such reservation in all matters of rightful legislation not interfering with the persons or property of the Indians under the protection of the United States. As to all matters and subjects of rightful legislation not interfering with that protection and not otherwise repugnant to the Constitution and laws of the United States the legislative power of the Territory is as absolute in and upon these reservations as in any other part of this Territory.
4. **Taxation of property on Indian reservations.**—Taxation is a rightful subject of legislation. It is the duty of the territorial legislature to apportion the burdens of government upon all property within the Territory not withdrawn from its jurisdiction by the organic act or otherwise exempted. The property of United States citizens not connected with the Indians kept

upon these reservations is a part of the mass of property within the Territory receiving the protection of its laws and subject to taxation. It was, therefore, the right and duty of the legislature to subject such property to taxation.

5. Taxation of cattle of citizens on Indian reservations not an impairment of the rights of the Indians.—Taxation of cattle of white men kept and grazed upon Indian reservations under leases from the Indians is not a taxation of any right or property of the Indians. The taxation in controversy in this case was not assessed or levied upon the real estate or upon the rents of real estate belonging to the Indians, and was therefore not invalid as interfering with the property rights of the Indians under the protection of the United States and withdrawn from the jurisdiction of the Territory, nor obnoxious to the principle of *Pollock vs. Farmers' Loan and Trust Company*, 157 U. S., 429, even if the constitutional provision governing that case was operative upon any other legislative body than the Congress of the United States or in the raising of revenue for any other government than the Federal Government, which it was not.
6. Taxing districts established by legislature, not by courts.—The establishing of taxing districts is a legislative not a judicial function. The taxing district comprising the county of Kay and the attached Indian reservations and unorganized country was not created by the order of the supreme court attaching such Indian reservations and unorganized country to Kay county for judicial purposes, but by the act of March 5th, 1895. The supreme court attached such territory to Kay county for judicial purposes and the legislature adopted and made the district thus created a taxing district.
7. Taxation—Discrimination between classes of property.—What is not.—An act providing for the taxation of personal property alone in a district where there is no real estate subject to taxation is not invalid as discriminating in taxing different kinds of property. Courts will take judicial knowledge of the treaties of the United States with Indian tribes and from those treaties that the title to the lands in the Indian reservations in this Territory is in the Indian tribes or in the United States for the benefit of the Indians and that there is no real estate therein subject to taxation.
8. Taxation—Purposes of validity.—Taxation must be for purposes in which the people taxed have a legal interest. Property which is located upon an Indian reservation and which is attached to a county of the Territory for judicial purposes, but is not within the geographical boundaries of the county and is not a part of the county for municipal purposes and in which the people thereof have no voice in the selection of the county and other officers and no part of the fund derived from the taxes levied can be expended for the purposes for which they were levied within such Indian reservation, and which taxes when collected are to be appropriated entirely to the expenses

of the county roads and schools within the organized county, cannot be taxed for the various county, school, and road purposes of such county. The property on such reservation can only be taxed for territorial and judicial purposes.

9. Laws, special—What are.—See *Daily Leader vs. Cameron*, 3 Okla., 677.
10. Taxation—Assessment—Uniformity as to time of.—An act providing for listing and assessing personal property in Indian reservations and unorganized territory at a different time from that fixed for listing and assessing such property in organized counties is not invalid for want of uniformity. Taxes must be assessed according to some uniform rule; but this does not mean that the time and method of assessment shall be identical, but only that after the legislature has declared what classes of property shall be subject to taxation the tax itself shall be levied upon such property or the owner thereof according to a uniform rate of valuation.

## 21 Error from the district court of Kay county.

Asp, Shartel & Cottingham, for plaintiffs in error; Mr. Att'y General Galbraith and D. L. Weir, for defendants in error.

The opinion of the court was delivered by—

TARSNEY, J.:

### *Statement of Facts.*

The plaintiffs in error are non-residents of the Territory of Oklahoma and owners of large herds of cattle that were kept and grazed, during a portion of the year 1895, in parts of the Osage Indian reservation in this Territory.

The defendants in error are the board of county commissioners, treasurer and sheriff of Kay county, Oklahoma Territory.

On the third Monday in February, 1894, the supreme court of the Territory of Oklahoma, by an order entered on the journals of said court, attached to said county of Kay, for judicial purposes, all the Kaw or Kansas Indian reservation and all of the Osage Indian reservation north of the township line dividing townships 25 and 26 north. All of said reservations so attached to said Kay county for judicial purposes by such order are without the boundaries of said Kay county as established by the Secretary of the Interior and are not within the boundaries of any organized county of this Territory. Said territory so attached to said county of Kay for judicial purposes is comprised wholly of lands owned and occupied by Indian tribes, and consists principally of wild, unimproved, and unallotted lands used for grazing purposes; that plaintiffs in error during the year 1895 and during the month of April of said year drove, transported, and shipped to the ranges and pastures in that part of said Osage Indian reservation attached to said Kay county for judicial purposes, as aforesaid, large herds and numbers of cattle, which were taken onto said reservation in pursuance and by virtue and authority of certain leases to plaintiffs in error for grazing pur-

poses made by the Osage tribal government under the supervision of the agent in charge of said tribe and upon the ratification and approval of the Commissioner of Indian Affairs and of the Secretary of the Interior, and said cattle of said plaintiffs in error were on the first day of May kept and grazed on that part of said Indian reservation attached to said Kay county for judicial purposes, as aforesaid.

By an act approved March 5, 1895, the Legislative Assembly of the Territory of Oklahoma amended section 13, article 2, chapter 70, of the Oklahoma Statutes relating to revenue, so that the same reads as follows: "That when any cattle are kept or grazed or any other personal property is situated in any unorganized country, district or reservation of this Territory, such property shall be subject to taxation in the organized county to which said country, district or reservation is attached for judicial purposes," and authorized the board of county commissioners of the organized county or counties to which such unorganized country, district, or reservation is attached to appoint a special assessor each year, whose duty it should be to assess such property, and conferred upon such special assessor all the powers and required him to perform all the duties of a township assessor. The assessor so provided for was required to begin and perform his duties between the first day of April and the 25th day of May of each year and to complete his duties and return his tax-lists on or before June 1st, and the property therein authorized to be assessed, it was provided, should be valued as of May 1st, each year.

In pursuance of the provisions of said act the county commissioners of said Kay county did duly appoint a special assessor for the year 1895 to assess such cattle as were kept and grazed and any other personal property situated in the unorganized country and parts of Indian reservations attached to said Kay county for judicial purposes, and said special assessor did, by virtue of said  
22 appointment, assess all the personal property in the territory so attached to the county of Kay for judicial purposes, including all of the cattle of the said plaintiffs in error kept and grazed in said reservation on the first day of May, 1895. The said special assessor assessed the property of these plaintiffs in error so located on said territory attached to said county of Kay for judicial purposes, as aforesaid, and returned the same upon an assessment-roll at the total valuation of \$760,469.00; that thereafter the said sum was, by the clerk of said county, carried into the aggregate assessment for said county, and by him certified to the auditor of the Territory; that the territorial board of equalization in acting upon the various assessments of the various counties as certified to said board raised the aggregate valuation of the property returned for taxation upon the tax-rolls of said county of Kay thirty-five per cent., and the county clerk for said county carried out the raised valuation so certified to him by said territorial board of equalization against the property of these plaintiffs in error and made the aggregate valuation of such property \$1,026,634.00. Thereafter the territorial board of equalization levied and duly certified to the county

clerk of the county of Kay tax levies for territorial purposes for the year 1895 as follows:

- General revenue, three mills on the dollar;
- University fund, one-half mill on the dollar;
- Normal school fund, one-half mill on the dollar;
- Bond interest fund, one-half mill on the dollar;
- Board of education fund, one-half mill on the dollar.

That the board of county commissioners for the county of Kay made the following levies for the year 1895:

- For salaries, five mills on the dollar;
- For contingent expenses, three mills on the dollar;
- For sinking fund, one and one-half mills on the dollar;
- For court expenses, two and one-half mills on the dollar;
- For county supplies, three mills on the dollar;
- For road and bridge fund, two mills on the dollar;
- For poor fund of said county, one mill on the dollar;
- For county school fund of said county, one mill on the dollar.

The county clerk of said county of Kay carried the valuation of the property of these plaintiffs in error upon the tax-rolls of said county, and against the same extended the levies as aforesaid, and charged against the property of these plaintiffs in error in the aggregate the sum of \$26,174.16.

Before these taxes became delinquent, plaintiffs in error began to remove or attempted to remove their respective property from the territory attached to Kay county for judicial purposes and beyond the limits of Oklahoma Territory. The treasurer of said Kay county issued tax warrants for the several amounts of taxes levied against the property of each of said plaintiffs in error, and delivered the same to the sheriff of said county for execution; said sheriff seized certain property of each of plaintiffs in error by virtue of such tax warrants. The plaintiffs in error filed their several petitions in the district court of Kay county, and on application obtained injunctions restraining the defendants in error from making any further attempt to collect such taxes. Afterwards, on motion, the several actions were consolidated into one. To the petition filed in such consolidated action the defendants in error filed a general demurrer. At the hearing the district court sustained the demurrer in part and overruled it in part, holding that all of the levies made for territorial purposes and the county levy for court expenses were valid; and as to those levies the injunction was dissolved, and as to all of the other county levies such injunctions were made perpetual. From that part of the order and judgment of the court dissolving the injunction as to the territorial taxes and the one county fund levy plaintiffs appealed. From that part perpetuating the injunction as to all of the county levies, except that for court expenses, the defendants appealed and filed their cross-petitions in error, and the case is thus here for review.



The questions involved are of great public and private interest and have received from us that very careful consideration and attention which their importance demands.

By section six of the organic act of the Territory, it is provided—

“That the legislative power of the Territory shall extend to all rightful subjects of legislation, not inconsistent with the Constitution and laws of the United States, but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed on the property of the United States nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents, nor shall any law be passed impairing the right to private property, nor shall any unequal discrimination be made in taxing different kinds of property, but all property subject to taxation shall be taxed in proportion to its value.”

\* \* \*

A broader grant of legislative power than that contained in this section could hardly be conceived of. This organic act of the Territory defined its boundaries, created a government which comprised a legislative department, vested with power of legislating upon all rightful subjects of legislation and coextensive with the exterior boundaries of the Territory. The taxing power is a part of the legislative power of government, and taxation is a rightful subject of legislation. Taxes are the enforced contributions upon persons or property levied by the government by virtue of its sovereignty for the support of government and for public needs. The citizen pays from his property the portion demanded in order that by means thereof he may be secured in the enjoyment of the benefits of organized society. The power is unlimited in its reach as to subjects; in its very nature it acknowledges no limit; it is sometimes said that in its exercise it may become a power to confiscate or to destroy, but this must be thus qualified, that under our system of constitutional governments it differs from the forced contributions, loans, and benevolences of arbitrary and tyrannical governments. It is not an arbitrary power, nor can it be exercised capriciously. It is hedged about and restricted by wise constitutional limitations and fixed general rules. These constitutional limitations and general rules are designed to secure a just apportionment of the burdens of government by requiring uniformity of contributions levied by fixed general rules and apportioned by the law according to some uniform measure of equality.

Within these rules and limitations the authority and power of the legislative department is absolute and conclusive. The ends sought to be reached by these general and fundamental rules and constitutional restrictions upon the powers of taxation are equality, uniformity, and justice in apportioning the burdens of government, but as the idea of exact equality, uniformity, or justice under any system of human laws being attainable is utopian, it is not expected that such exactness can be attained in the exercise of the powers of

taxation. Notwithstanding such fixed general rules and limitations, the discretion of the legislature is very broad and its exercise may work injustice and oppression. If such discretionary power be threatened with abuse, security must be found in the responsibility of the legislature that imposes the tax to the constituency that elected them. The judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons or with regard to property, but if it do not clearly violate some established rule of limitation, the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. The courts can only interfere when the conclusion is unavoidable that the legislature has transcended its powers or clearly violated some constitutional or other fixed general rule defining or limiting such power.

*Veazie Bank v. Fenno*, 8 Wall., 548.

*Weston v. Charleston*, 2 Peters, 449-466.

*Lane County v. Oregon*, 7 Wall., 71.

*Tallinan v. Butler*, 12 Iowa, 531.

24 Our inquiry, then, is, did the legislature, by the act of 1895, under authority of which the taxes in controversy *was* assessed and levied, transcend its powers, and is such act a violation of any constitutional or other fixed general rule controlling the discretion of the legislature?

The only limitation or restriction upon the taxing power of the legislature which I find in the organic act for the Territory is that contained in section six (6) of said act, which is as follows:

"No tax shall be imposed on the property of the United States nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents, nor shall any law be passed impairing the right to private property, nor shall any unequal discrimination be made in taxing different kinds of property, but all property subject to taxation shall be taxed in proportion to its value."

And the following provision in section one (1) of said act:

"Provided, that nothing in this act shall be construed to impair any right now pertaining to any Indians or Indian tribe in said Territory under the laws, agreements and treaties of the United States or to impair the rights of person or property pertaining to said Indians, or to affect the authority of the Government of the United States to make any regulation or to make any law respecting said Indians, their lands, property or other rights which it would have been competent to make or enact if this act had not been passed."

If, therefore, there be any restriction or limitation upon the power of the legislature to tax the property of plaintiffs or which makes such taxation invalid, it must be found in these provisions of the organic act or in the Constitution, treaties, or legislation of the United States or some general rule inherent in our system of government. It is not contended that the act under which these taxes



are sought to be imposed is obnoxious to any provision of the Federal Constitution, but it is contended by plaintiffs that the legislature has no jurisdiction to enact laws, especially tax laws, and put the same in force in these Indian reservations, the argument being that, although these reservations are within the exterior boundaries of Oklahoma Territory, yet they comprise no part of the Territory for territorial governmental purposes, but are exclusively under the jurisdiction of the United States, and that the legislative power of the Territory does not extend over them. It is conceded by counsel for plaintiffs that the treaty under which the Osage Indians were settled on these lands contained no provision or stipulation by which said Indian tribe or the lands occupied by them were not without their consent to be included within the limits or jurisdiction of any State or Territory that might thereafter be created and which should include such reservation within its exterior boundaries; that there was at the time the organic act creating the Territory of Oklahoma was passed and at the time the act of 1895 authorizing the taxation in controversy was enacted and at the time these taxes were assessed and levied no treaty with the Osage Indian tribe that the lands or any part thereof within this reservation should be thus excluded from the limits and jurisdiction of any State or Territory.

I think there is no proposition better settled by authorities than that in the absence of such treaty stipulation the authority of the Territory may rightfully extend over such reservation in all matters of rightful legislation not interfering with the persons and property of the Indians within such reservation under the protection of the laws and authority of the United States, and that as to all matters and subjects of rightful legislation not interfering with that protection and not otherwise repugnant to the Constitution and laws of the United States the legislative power of the Territory is absolute.

Utah & Northern Railway v. Fisher, 116 U. S., 28.

Langford v. Monteith, 102 U. S., 145.

Phoenix and Maricopa R. R. Co. v. Arizona Territory, sup. court of Ariz., 26 Pac. Rep., 310.

Maricopa & Phoenix R. R. Co. v. Ariz. Ter., 156 U. S., 347.

Torrey v. Baldwin, 26 Pac. Rep., 908.

Gon-Shay-ee, petitioner, 130 U. S., 343.

Ex parte Crow Dog, 109 U. S., 556-560.

U. S. v. Kagama, 118 U. S., 375.

United States v. Pidgeon, 153 U. S., 48.

This doctrine was distinctly held by this court in *Keokuk v. Ulam*, 4 Okla., 38 Pac. Rep., 1083. The contention of plaintiffs upon this proposition would seem to be based upon reasonings  
 25 and authorities which are not applicable. Their contention seems to be that these reservations are to be considered as exclusively under the jurisdiction of the United States, the same as lands purchased by the United States within the boundaries of States, and with the consent of said States for the purposes of forts,

arsenals, magazines, navy yards, dock yards, etc. If this contention were correct, then it would be supported by all the authorities and would prevail, for I concede it to be uncontroverted that property situated wholly within boundaries exclusively within the jurisdiction of the United States cannot be taxed by the State or Territory within which it may be situated; but these reservations are not within boundaries exclusively within the jurisdiction of the United States for the reason that Congress, in section six (6) of the organic act of this Territory, delegated to the government of the Territory legislative power extending to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States within the exterior boundaries of the Territory created by that act, which includes the reservation which is the locus of this controversy; that the jurisdiction conferred upon the Territory is not exclusive; that Congress has reserved to itself jurisdiction over the persons and lands of the Indians occupying the reservation does not diminish or restrict the authority of the Territory to legislate concerning the persons and property of citizens of the United States therein. It was the duty of the territorial legislature to apportion the burdens of government upon all property within the Territory not withdrawn from its jurisdiction by the organic act or other laws of the United States or not otherwise exempted from such burden by law. The property of the plaintiff comprised a part of the mass of property within the Territory which was receiving the protection of its laws and which might lawfully be and should justly be subjected to taxation. And the right to subject such property to taxation, under the conditions and the situation in which plaintiff's property was, has not been denied by any court, but has been upheld in numerous instances.

Utah Northern R'y *v. Fisher*, 116 U. S., 28.

*Torrey v. Baldwin*, 26 Pac. Rep., 908.

*Phoenix & Maricopa R. R. Co. v. Ter. of Ariz.*, 26 Pac. Rep., 310.

*Ferris v. Vennier*, 6 Dacotah, 42 N. W. Rep., 34.

*Marico & Phoenix R. R. Co. v. Ariz. Ter.*, 156 U. S., 347.

In *Torrey v. Baldwin*, 26 Pac. Rep., 908, *supra*, the supreme court of Wyoming held that the treaty of July 3rd, 1868, with the Shoshones, pursuant to which their reservation was established, contained no reservation or exception whereby it should be excluded and excepted out of the Territory within which it was situated and that the reservation was included within the Territory, and that cattle thereon belonging to a white person in no wise connected with the Indians were subject to taxation in the county within which the reservation lay.

In *Phoenix and Maricopa Railroad Company v. Arizona Territory*, *supra*, the supreme court of Arizona held that in the absence of treaty or other express exclusions the different Indian reservations became a part of the Territory where situate and subject to territorial legislative jurisdiction, subject however to the powers of the General Government to make regulations respecting the Indians, their property, etc., and that a railroad built across an Indian reser-

vation in the Territory is subject to taxation by the Territory where there are no treaty stipulations or express exclusions against the jurisdiction of the Territory, and this decision was, on appeal, affirmed by the Supreme Court of the United States in 156 U. S., 347, *supra*.

In *Utah Northern Railway v. Fisher*, 116 U. S., 31, Mr. Justice Field says:

"The authority of the Territory may rightfully extend to all matters not interfering with that protection. (Protection of Indians and their property.) It has therefore been held that process of its courts may run into an Indian reservation of this kind where the subject-matter or controversy is otherwise within their cognizance. If the plaintiff lawfully constructed and now operates a railroad through the reservation it is not perceived that any just rights of the Indians under the treaty can be impaired by taxing the road and property used in operating it."

26 A further contention of the plaintiffs is: That this reservation, under the statutes of the United States, has been leased by the Osage nation or tribe for grazing purposes, and that the taxation of cattle kept and grazed upon said reservation is a direct tax upon the right of the Indians to lease the same, and decreases to the extent of the tax the value of the Indian lands; that the act authorizing such taxation is in direct derogation of the property rights of the Indians upon such reservation, and is therefore void. This proposition is without merit, and certainly is unsupported by authority. The authority upon which plaintiffs rely to support this contention is the case of *Pollock v. The Farmers' Loan and Trust Company*, 157 U. S., 429, known as the Income Tax case. Counsel in their brief quote from Mr. Chief Fuller on page 555 in the report of that case as follows:

"The contention of the plaintiff is, first, that the law in question, in imposing a tax upon the income or rents of real estate, imposes a tax upon the real estate itself, and in imposing a tax upon the interest or income of bonds or other personal property held for the purpose of income or ordinarily yielding income imposes a tax upon the personal estate itself; that such tax is a direct tax and void, because imposed without regard to the rule of apportionment, and that by reason thereof the whole law is invalid."

It is true that that contention was sustained by a majority of a divided court in that case, but I am unable to perceive its application to the principles of the case at bar. The contention was sustained in that case, because it was held that a tax upon the income or rents of real estate imposed a tax upon the real estate itself; that it was therefore a direct tax, and that, being such, it was obnoxious to the provision of the Constitution prohibiting the levy of direct taxes except by apportionment among the several States. It would not be seriously contended that that provision of the Federal Constitution prescribed a rule operative upon any other legislative authority than the Congress of the United States, or in the raising of revenue for the support of any government other than the Federal Government; but even if such contention should be made the

principle of the case cited is not broad enough to cover the proposition submitted by counsel for plaintiffs. The taxation we are considering was not assessed or levied upon the real estate or other property of the Indians occupying this reservation, nor upon the income or rents of such Indians derived from such real estate or other property. This tax is not levied upon the rents which are paid to these Indians under their leases to the plaintiffs, but it is levied upon the property of the plaintiffs, in which the Indians have no interest. The argument that taxation upon property brought into this reservation for the purpose of grazing upon Indians' lands is an additional servitude that decreases the salable value of the land, and that it operates in fixing the rental value of these lands to the same extent it would if made a tax upon the land itself is scarcely less remote than to say that the tariffs which these cattle-owners have to pay to railroad corporations for transporting their cattle out of these reservations to market is an additional servitude that decreases the rental value of the lands of the Indians, or that the taxation of the personal property of a tenant is an added servitude on the freehold of the landlord. I do not think the act of the legislature providing for this taxation in any manner impairs the property rights of the Indians occupying this reservation.

Another contention of the plaintiffs is that this taxation is unconstitutional and void because it rests upon the attempt of the supreme court of the Territory to fix taxing districts, which is a legislative function. The answer to this proposition is that the supreme court of the Territory has not attempted to fix any taxing districts; that that court, under the powers expressly invested in it by the organic act of the Territory, in 1894, attached this reservation and unorganized country to Kay county for judicial purposes, and not for the purpose of taxation; that the taxing districts in which these taxes were imposed and levied *was* created and fixed, *not* by the supreme court, but by the legislature in the act of 1895, the language of the act being:

"That when any cattle are kept or grazed or any other personal property is situated in any unorganized country, district or reservation of this Territory, that such property shall be subject to taxation in the organized county to which said country, district or reservation is attached for judicial purposes."

27 It was by this act that a taxing district was created and not by the order of the court.

Another objection which plaintiffs make against the legality of this tax is, that the act attempting to authorize it only applies to personal property; that no provision is made for the taxing of real estate in such reservation; that it is a discrimination in taxing different kinds of property, and, therefore, in conflict with the organic act.

This court will take judicial knowledge of the public treaties of the United States, and from such treaties the court has judicial knowledge that the title to all the lands within this Indian reservation is in the Indian tribe or in the United States for the use of said Indian tribe. The power of taxation possessed by the territorial

government, not extending to the taxing of the property of the United States or of the Indian wards of the United States, there is no taxable real estate in said reservation, and consequently the act does not discriminate as between different kinds of property subject to taxation, there not being different kinds of property subject to taxation in such reservation.

The most serious contention of the plaintiffs that confronts us in this matter is, that the act under which these taxes were assessed and levied is void for the reason that it attempts to tax property situated in these Indian reservations for the benefit of the counties to which they are attached for judicial purposes. The owners and holders of property on these Indian reservations, it being claimed, have no interest in the taxes gathered by said counties, no voice in their expenditure nor benefit therefrom, said Indian reservation not being within the geographical boundaries of said counties; that the taxing of the owners of said property by such counties is taking the property of the persons holding said property on said reservation for the benefit of the residents of said county, and is, therefore, taking private property for private uses.

It is argued that plaintiffs have no interest in the purposes for which these taxes are to be expended and will derive no benefit from their expenditure; that the moneys derived from this taxation under the county levy will all be expended within the organized county of Kay; that plaintiffs are non-residents of the Territory and that neither they or their property are within said county of Kay, and, therefore, cannot be benefited by the expenditure of moneys apportioned and used for the salary fund, contingent expense fund, sinking fund, court expense fund, county supplies fund, road and bridge fund, poor fund, or county school fund of said county.

We have been cited to or been able to find but one authority directly in point upon the proposition as presented in this case. In the case of *Ferris v. Vennier*, 42 N. W. Rep., 34, the supreme court of Dakota Territory, in a case similar to this in all particulars save that the attached territory was not an Indian reservation but was unorganized territory, held the levy for territorial purposes to be valid and those for county purposes to be invalid. There are a number of authorities upon analogous cases, but such authorities are conflicting. The greater number of authorities presented by counsel for plaintiffs in their brief upon this proposition relate to cases of special assessments for local improvement such as the construction of highways, streets, pavements, sewers, etc., where the benefits are peculiar to a limited district or locality and this class of cases have always been held distinct in principle from that which we are considering, and the right to impose such taxes has always been held to be founded upon and to be governed by different principles from those embraced in public taxation for ordinary public or governmental purposes.

Bearing upon the case at bar is the case of *Wells v. The City of Weston*, 22 Mo., 384, in which the court held that "The legislature cannot authorize a municipal corporation to tax for its own local purposes land lying beyond the corporate limits."

28 In *Cheany v. Hooser*, 9 Ben. Monroe, 341, the court held that the extension of the limits of one town so as to include the adjacent lands of another town, against or without the consent of the owners, and subject the property and people within the added territory to the jurisdiction and taxing powers of the extended municipal government without the consent of the added population is in effect taking private property for public use.

In *Sharpless v. Mayor of Philadelphia*, 21 Penn. State, 172, the court said: "By taxation is meant a certain mode of raising revenue for a public purpose in which the community that pays it has an interest; but to make a tax law unconstitutional on this ground it must be apparent at the first blush that the community taxed can have no possible interest in the purpose to which their money is to be applied; and this is more especially true if it be a local tax and if the local authorities have themselves laid the tax in pursuance of an act of the assembly."

In a case in Tennessee, *Taylor, McBean & Co. v. William R. Chandler et al.*, 9 Heiskall, 349, the court said: "A State burden cannot be placed upon any territory less than the entire State nor a county burden upon territory greater or smaller than the county."

In the case of *Washington Avenue*, 69 Penn. State, 361, the learned judge, delivering the opinion, says:

"I admit that the powers to tax is unbounded by any express limit in the constitution; that it may be exercised to the full extent of the public exigency. I concede that it differs from the power of eminent domain and has no thought of compensation by way of a return for that which is taken and applied to the public good further than all derive benefit from the purpose to which it is applied."

In *Monford v. Unger*, 8 Iowa, 82, the court said:

"The extension of the limits of a city or town so as to include its actual enlargement as manifested by houses and population is to be deemed a legitimate exercise of legislative power. An indefinite or unreasonable extension, so as to embrace lands and farms that are distant from the local government, does not rest upon the same authority; and, although it may be a delicate as well as a difficult duty for the judiciary to interpose, we have no doubt but that there are limits beyond which the legislative discretion cannot go."

*Kelley v. The City of Pittsburg*, 104, U. S., 658, was a case wherein the city of Pittsburg, under an act of the legislature, extended the city limits so as to include the plaintiff's farm and assessed the same as other property in the city was assessed for street tax, school tax, etc., the court in sustaining the validity of the extension said:

"We cannot say judicially that Mr. Kelley received no benefit from the city organization. These streets, if they do not penetrate his farm, lead to it. The water works will probably reach him some day and may be near enough him now to serve on some occasions. The schools may receive his children, and in this regard he can be in no worse condition than those living in the city having no children and who pay for the support of the schools. Every man in a county, a town, a city, a State is deeply interest- in the education



of the children of the community, because his peace and quiet, his happiness and prosperity are largely dependent upon the intelligence and moral training which it is the object of the public schools to supply to the children of his neighbors and associates, if he has none himself. The police government, the officers whose duty it is to punish and prevent crime, are paid out of the taxes. He has no interest in their protection, because he lives farther from the courthouse and police station than the others. Clearly these are matters of detail within the legislative discretion, and therefore of power in the law-making body within whose jurisdiction the parties live. This court cannot say in such cases, however great the hardships or unequal the burden, that the tax collected for such purposes is taking the property of the tax-payers without due process of law."

I might multiply citations from conflicting authorities like these without finding any rule to guide or definitely determine where the line can be drawn which determines in cases like this the limit of legislative discretion.

Nearly if not all these cases arose to test the extent and limit of authority in subordinate agencies of the State, like municipal corporations, and not the discretion vested in the legislature of the State. No court has yet attempted to define specifically the benefits that a tax payer must receive from government in order to make valid the public taxes taken from him. True, in theory, taxation should be equal, not only in its burdens but its benefits, but this equality is never attained. No one questions the right of a Commonwealth to tax the property of non-residents within its

29 borders, yet such non-residents do not stand upon a basis of equality in the benefits of the government that imposes the tax. They may or may not receive particular benefits from its courts, its schools, the improvement of its public highways, or from any of the other purposes to which its revenues are appropriated; but such benefits are never a test of the liability of their property to taxation. The plaintiffs in this case might have their herds of cattle within the limits of Kay county and receive no greater benefit in the protection of the laws than they do now; yet they would not be heard to assert that such property should not be taxed for the various county purposes to which taxation is appropriated.

The counties, cities, and towns of this Territory are not independent or distinct governments from that of the Territory. They are a part of that government; they are the instrumentalities and agencies through which the territorial government promotes the welfare of its inhabitants and through which the Territory is better enabled to protect the lives and liberties of its inhabitants and the property that is within its borders, whether that of its own citizens or that of non-residents. The nearer these purposes are attained, the greater are the benefits to these plaintiffs, as well as to all others having property subject to the protection of its laws.

Laws similar to this attaching unorganized territory to municipal townships in the State of Michigan were for years maintained and enforced; and though the taxes gathered from the attached territory was appropriated and expended for the purposes of the town-



ship to which it was attached, I do not find that their validity was ever directly called into question.

*Roscommon v. Midland*, 39 Mich., 424.

*Township of Comins v. Township of Harrisville*, 45 Mich., 442.

In this last case the facts found by the court were that from the year 1869 until March, 1877, the county of Oscoda was attached to the county of Alcona for judicial and municipal purposes, and up to the last-named date the township of Harrisville, in said Alcona county, exercised municipal jurisdiction over the territory comprising the unorganized county of Oscoda; that in 1877 the legislature organized the county of Oscoda unto a township called by the act creating it "the township of Comins." In that year and after the passage of said act, but before said township of Comins had been fully organized by the election of township officers, the township of Harrisville made an assessment-roll embracing, with other territory, all the territory in the county of Oscoda, and the taxes thus assessed were collected by the officers of the township of Harrisville. In 1879 the township of Comins made a demand on the township board of the township of Harrisville for the payment to the township of Comins for the taxes thus collected in 1877 and suit was brought therefor. On that case Marston, chief justice, says:

"The laws of this State relating to the assessment, levy, and collection of taxes does not regard certain designated territory as a township until the proper officers necessary to conduct its affairs have been elected. The officers of the new township not having been elected until July, there was no such perfected organization as would enable that township to assess the township and school taxes for that year. Under such circumstances, in my opinion, the township of Harrisville had a right to levy and collect the taxes in question, but, whether they did or not, the present action will not lie to recover the money so collected."

I can perceive no distinction in principle between that case and the case at bar; and although the legality of the assessment and collection of the taxes imposed was not directly involved in the case, both the circuit judge trying the case and the chief justice express no doubt as to their legality.

Not being able to point the provision in the Constitution, the organic act in any statute, or general rule limiting the powers and discretion of the legislature in imposing these taxes, from which I can say that they are unquestionably void, I am not disposed to arbitrarily invade the province of the legislative department to sit in review, without other evidence than that which they possessed, and say that in this case they have abused the discretion vested in them to such a degree as to call for our interference. Under the general rules stated herein, we have no right to do this.

30 This taxation may not be levied upon the basis of absolute equality. It may in a measure be unjust. It may impose upon the plaintiffs in this case a burden without equal compensa-

tion in benefits with others, but this alone will not warrant our interference.

Unquestionably the plaintiffs are benefited in some degree by the expenditure of these taxes in Kay county. The proximity to their property of a well-ordered community, with courts and schools open to the plaintiffs if they wish to avail themselves of them, with good roads and bridges, with provision made for the care and maintenance of the poor and indigent—with these and other elements of civilization, order, and observance of law for which money obtained by taxation is expended, it is beyond dispute that plaintiffs have a greater security in their property rights than they would have without them. These are the benefits upon which the right of taxation is based and gives to the legislature the acknowledged authority to impose taxation. The authority being acknowledged, the reasonableness of or necessity for its exercise cannot be inquired into by the courts. Of such reasonableness or necessity the legislature and not the courts are to judge.

The validity of these taxes is further assailed on the ground that the act of the legislature authorizing them is obnoxious to the act of Congress of July 30, 1886, 24 U. S. Stat. at Large, page 170, which provides as follows:

"That the legislature of the territories of the United States now or hereafter to be organized shall not pass local or special laws in any of the following enumerated cases—that is to say, \* \* \* for the assessment and collection of taxes for territorial, county, township, or road purposes."

It is insisted that the act in question is local and special. I cannot perceive how this contention can be sustained. The act has none of the elements of a local or special law. It does not operate upon an individual or a number of designated individuals or upon particularly designated property; it operates upon any individual and upon any property that may come within its general provisions. Mr. Cooley in his work on Constitutional Limitations, page 480, says:

"The authority that legislates for the State at large must determine whether particular rules shall extend to the whole State and all its citizens, or, on the other hand, to a subdivision of the State or a single class of its citizens only."

Again he says, page 481:

"If the laws be otherwise unobjectional, all that can be required in these cases is that they be general in their application to the class or locality to which they apply, and they are then public in character, and of their propriety and policy the legislature must judge."

The constitutional requirement of equal protection of the laws does not make necessary the same local regulations, municipal powers, or judicial organization or jurisdiction.

*Missouri v. Lewis*, 101 U. S., 32.

*Virginia v. Rives*, 100 U. S., 313.

*Ex parte Virginia*, 100 U. S., 339.

The prohibition of special legislation for the benefit of individuals does not preclude laws for the benefit of particular classes, as, for example, mechanics and other laborers.

*Davis v. State*, 3 Lea, 376.

We think the case of *Daily Leader v. Cameron*, 3 Okla., 677, is decisive on this point. In that case this court says:

"A statute relating to persons or things as a class is a general law; one relating to particular persons or things of a class is special. The number of persons upon whom the law shall have any direct effect may be very few by reason of the subject to which it relates, but it must operate equally and uniformly upon all brought within the relations and circumstances for which it provides. A statute, in order to avoid a conflict with the prohibition against such special legislation, must be general in its application to the class, and all of the class within like circumstances must come within its operation."

The statute in question in this case does not operate upon persons or things within a general class, but upon persons and things as a class. It operates upon all the unorganized counties, districts, and reservations within the Territory and upon property generally within such unorganized county, district, or reservation, and operates uniformly upon such several counties, districts, and reservations and upon the persons and things that may be brought therein, and is therefore in no sense local or special in its character.

It is further claimed that the act of 1895 violates the principle of uniformity in providing for an assessment of cattle kept and grazed on these Indian reservations and unorganized territory at a different time from that provided for the assessment of personal property in the organized counties; that for this reason it unjustly discriminates against the owner of such cattle, and is therefore void.

I have already shown it to be a fundamental principle that the rules of taxation shall be uniform. It is of the very nature of a tax that it should be assessed according to some uniform rules; otherwise it would be confiscation and not taxation. But this does not mean that the time and method of assessment shall be identical, but only that after the legislature has declared what classes of property shall be subject to taxation the tax itself shall be levied upon such or the owner thereof according to a uniform rate of valuation.

*Nelson Lumber Co. v. Town of Lorraine*, Sup. Ct. Wis., 22 Fed. Rep., 54.

Statutory provisions authorizing the assessment of different classes of property at different dates, or of the same classes of property in different localities at different dates, are so common that their validity for this reason is scarcely ever called in question. The revenue law of this Territory provides that real estate shall be valued for taxation on the first day of January, and that personal property in the counties shall be assessed on the first day of February of each year.

Counsel for plaintiffs, in their brief, ask, "What valid reason can

be suggested why the property situated on these Indian reservations should be assessed and valued on one day and the property situated in the organized counties should be assessed and valued on another day?"

I think the answer to this question is found in the language of the supreme court of Wisconsin in *Nelson Lumber Company v. Town of Loraine*, *supra*, wherein it says:

"The purpose of the law would seem to be to bring about that substantial equality in taxation which the common law as well as the Constitution requires. The legislature was aware that the logs of non-residents as well as residents owners were liable to be floated out of the State in the month of April, or if not run out of the State might become mixed with the logs of other persons in the different streams in such a manner as to render it quite impracticable to take any separate account of them in the month of May, when the logs of resident owners were assessed. Very often they would be beyond the jurisdiction of the taxing officer of the town, and, as the owner could not be reached and had no local agent in the State, they escape entirely. The law, by providing that the situation, amount, and value of the logs be taken in April at the place where piled or banked, seeks to put non-resident and resident owners on the same footing."

The legislature of this Territory, when they enacted the law of 1895, undoubtedly took into consideration the peculiar conditions and situation of the property to be taxed in these reservations; that nearly all of the cattle that were kept on these reservations were brought into the Territory after the first of February and would be removed before another listing of property for taxation, and unless a different date from that existing in the general law should be fixed for its assessment, such property would entirely escape taxation. The very principle of uniformity required that this distinction in dates of assessment should be made. It was not an injustice against the owners of the property, but it was to prevent injustice to the Territory and to all its tax-paying citizens by prohibiting this property from escaping its just share of the burdens of taxation. I think this was a very proper exercise of the discretion of the legislature, and that no discrimination exists such as is inhibited by the organic act of the Territory and the act of Congress of July 30, 1886.

The final proposition contained in plaintiffs' brief, that relating to the action of the territorial board of equalization in raising the aggregate valuations of property returned from the county of Kay for the year 1895, having been fully considered and determined by this court at this term in the case of *Wallace vs. Bullen* and held adversely to the contention of the plaintiffs herein, fully disposes of this point.

32 For the reasons stated upon the various points submitted herein I am of the opinion that the legislature was vested with full authority to extend the revenue laws of the Territory over the Indian reservations and other unorganized territory within this Territory; that the act of 1895 was a proper exercise of such authority; that said act does not contravene any constitutional or

other established rule of taxation; that I can find nothing in this record showing such abuse of the discretionary power of the legislature as warrants our interference; that the assessment and taxation of plaintiffs' property under said act and in the manner shown was valid. I think that it follows, therefore, that the action of the court below in overruling defendants' demurrer to plaintiffs' petition, in so far as it related to the assessment and levy of said taxes for county purposes and perpetuating the injunction against the collection of such taxes, was erroneous, and the judgment of said court enjoining the collection of said taxes should be reversed and this cause be dismissed.

Scott, J., and McAtee, J., concurring to the extent of holding that the tax levied for territorial and court expense funds are valid, but also hold that the balance of the levies are unauthorized, for the reason that the people on these reservations are not interested in such levies and receive no benefit from the expenditure of the moneys derived from such levied.

The judgment of the district court is affirmed. Dale, C. J., dissents; Bierer, J., who tried the case below, not sitting.

Endorsed: Opinion. Filed September 4th, 1896. Edgar W. Jones, clerk supreme court.

33 In the Supreme Court of the Territory of Oklahoma.

D. P. GAY and A. S. REED, as Partners as Gay & Reed; A. M. Miller and J. B. Johnson, as Partners as Miller & Johnson; M. Halff and S. Halff, as Partners as Halff Brothers; R. H. Harris, W. C. Harris, and William Childers, as Partners as Harris Brothers & Childers; E. T. Comer and H. C. Comer, as Partners as Comer Brothers; J. H. Carney, G. M. Carpenter, Virgil Herard, G. T. Hume; W. F. Smith and W. L. McCauley, as Partners as Smith & McCauley; W. F. Smith, W. W. Irons, A. I. Adams; A. I. Adams and Neal Shafer, as Partners as Adams & Shafer; C. W. Burt, E. M. Hewins, I. D. Harkleroad; Douglas Pierce and J. T. Crump, as Partners as Pierce & Crump; James Stone, W. M. Holloway, Jesse H. Pugh, R. H. Mosley, Drury Warren, T. J. Moore, J. M. Slater, and R. W. Prosser, Plaintiffs in Error and Defendants in the Cross-petition in Error,

Petition on  
Appeal.

vs.

A. M. THOMAS, J. B. HART, and H. B. OWEN, as the Board of County Commissioners of Kay County, Oklahoma Territory; J. H. Lane, as the County Clerk of Kay County, Oklahoma Territory; S. J. Smock, as County Treasurer of Kay County, Oklahoma Territory, and H. C. Masters, as Sheriff of Kay County, Oklahoma Territory, Defendants in Error and Cross-petitioners in Error.

The above-named defendants in error and cross-petitioners in

error, conceiving themselves aggrieved by the final judgment and decree made and entered on the 4th day of September, A. D. 1896, in the above-entitled cause, do hereby appeal from said judgment and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors, which is filed herewith, and they pray that this appeal may be allowed, and that a transcript of the record, pleadings, proceedings, and papers upon which said judgment and decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 18th day of November, A. D. 1896.

D. L. WEIR,

*County Attorney of Kay County, Oklahoma Territory, and*

BLEVINS & KING,

*Attorneys for Cross-petitioners in Error and Appellants.*

The foregoing appeal is allowed this 18th day of November, A. D. 1896.

FRANK DALE,

*Chief Justice.*

Endorsed: In the supreme court of Oklahoma Territory. D. P. Gay and A. S. Reed, as partners as Gay and Reed, *et al. vs. A. M. Thomas, J. B. Hart, H. B. Owen*, as the board of county commissioners of Kay county, Oklahoma Territory, *et al.* Prayer for appeal and allowance of appeal. Filed November 18th, 1896. Edgar W. Jones, clerk.



## 34 In the Supreme Court of the Territory of Oklahoma.

D. P. GAY and A. S. REED, as Partners as Gay & Reed; A. M. Miller and J. B. Johnson, as Partners as Miller & Johnson; M. Halff and S. Halff, as Partners as Halff Brothers; R. H. Harris, W. C. Harris, and William Childers, as Partners as Harris Brothers & Childers; E. T. Comer and H. C. Comer, as Partners as Comer Brothers; J. H. Carney, G. M. Carpenter, Virgil Herard, G. T. Hume; W. F. Smith and W. L. McCauley, as Partners as Smith & McCauley; W. F. Smith, W. W. Irons, A. I. Adams; A. I. Adams and Neal Shafer, as Partners as Adams & Shafer; C. W. Burt, E. M. Hewins, I. D. Harkleroad; Douglas Pierce and J. T. Crump, as Partners as Pierce & Crump; James Stone, W. M. Holloway, Jesse H. Pugh, R. H. Mosley, Drury Warren, T. J. Moore, J. M. Slater, and R. W. Prosser, Plaintiffs in Error,

Cross-petition on  
Appeal.

*against*

A. M. THOMAS, J. B. HART, and H. B. OWEN, as the Board of County Commissioners of Kay County, Oklahoma Territory; J. H. Lane, as the County Clerk of Kay County, Oklahoma Territory; S. J. Smock, as the County Treasurer of Kay County, Oklahoma Territory, and H. C. Masters, as Sheriff of Kay County, Oklahoma Territory, Defendants in Error.

The above-named plaintiffs in error, conceiving themselves aggrieved by the decree made and entered in this cause in the above-named court on the — day of September, A. D. 1896, do hereby appeal from the said order and decree to the Supreme Court of the United States for reasons specified in the assignment of errors, which is filed herewith, and they pray that this their appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

HENRY E. ASP,  
JOHN W. SHARTEL, &  
JAMES R. COTTINGHAM,  
*Attorneys for Plaintiffs in Error.*

Now, on this 20th day of November, A. D. 1896, — is presented to me, the undersigned, the chief justice of the supreme court of the Territory of Oklahoma and one of the judges before whom said cause was tried and submitted, and after examining the foregoing petition on appeal it is by me ordered that the said appeal be, and the same is hereby, allowed, and that the said appeal be allowed in



connection with the appeal heretofore granted to the said plaintiffs in error on, to wit, the 18th day of November, A. D. 1896, and that the appeal of the said plaintiffs in error hereby allowed be, and the same is hereby, allowed as a cross-appeal, and the clerk of said court, in certifying the transcript under this appeal, is directed to certify but one transcript on the original appeal and to incorporate all papers pertaining to this cross-appeal therein.

FRANK DALE,  
Chief Justice.

Endorsed: In the supreme court of Oklahoma Territory. Gay & Reed *et al.* vs. A. M. Thomas *et al.* Cross-petition on appeal. Filed November 20th, 1896. Edgar W. Jones, clerk.

35 THE UNITED STATES OF AMERICA, 33:

To D. P. Gay and A. S. Reed, as partners as Gay & Reed; A. M. Miller and J. B. Johnson, as partners as Miller & Johnson; M. Halff and S. Halff, as partners as Halff Brothers; R. H. Harris, W. C. Harris, and William Childers, as partners as Harris Brothers & Childers; E. T. Comer and H. C. Comer, as partners as Comer Brothers; J. H. Carney, G. M. Carpenter, Virgil Herard, G. T. Hume; W. F. Smith and W. L. McCauley, as partners as Smith & McCauley; W. F. Smith, W. W. Irons, A. I. Adams; A. I. Adams and Neal Shafer, as partners as Adams & Shafer; C. W. Burt, E. M. Hewins, I. D. Harkleroad; Douglass Pierce and J. T. Crump, as partners as Pierce & Crump; James Stone, W. M. Holloway, Jesse H. Pugh, R. H. Mosley, Drury Warren, T. J. Moore, J. M. Slater, and R. W. Prosser, and Messrs. Asp, Shartell & Cottingham, their attorneys, Greeting:

Whereas A. M. Thomas, J. B. Hart, and H. B. Owen, as the board of county commissioners of Kay county, Oklahoma Territory; J. H. Lane, as the county clerk of Kay county, Oklahoma Territory; S. J. Smock, as county treasurer of Kay county, Oklahoma Territory, and H. C. Masters, as sheriff of Kay county, Oklahoma Territory, have lately appealed to the Supreme Court of the United States from a judgment and decree rendered in the supreme court of the Territory of Oklahoma in favor of you, the said D. P. Gay and A. S. Reed, as partners as Gay & Reed; A. M. Miller and J. B. Johnson, as partners as Miller & Johnson; M. Halff and S. Halff, as partners as Halff Brothers; R. H. Harris, W. C. Harris, and William Childers, as partners as Harris Brothers & Childers; E. T. Comer and H. C.

36 Comer, as partners as Comer Brothers; J. H. Carney, G. M. Carpenter, Virgil Herard, G. T. Hume; W. F. Smith and W. L. McCauley, as partners as Smith & McCauley; W. F. Smith, W. W. Irons, A. I. Adams; A. I. Adams and Neal Shafer, as partners as Adams & Shafer; C. W. Burt, E. M. Hewins, I. D. Harkleroad; Douglass Pierce and J. T. Crump, as partners as Pierce & Crump; James Stone, W. M. Holloway, Jesse H. Pugh, R. H. Mosley, Drury Warren, T. J. Moore, J. M. Slater, and R. W. Prosser, and having filed the security required by law, you are, therefore,

hereby cited and admonished to be and appear before the Supreme Court of the United States, to be holden at the city of Washington, D. C., within thirty days from the day this citation bears date, to do and to receive what may pertain to justice to be done in the premises.

Given under my hand, at the city of Guthrie, in the Territory of Oklahoma, this 18th day of November, A. D. 1896.

FRANK DALE,

*Chief Justice of the Territory of Oklahoma.*

Attest: EDGAR W. JONES,

*Clerk Supreme Court.*

Service of the within and foregoing citation is hereby accepted and admitted this 19th day of November, A. D. 1896.

[Seal Supreme Court, Territory of Oklahoma.]

ASP, SHARTEL & COTTINGHAM,

*Attorneys for Plaintiffs in Error and Appellees.*

[Endorsed:] No. —. Original. In the supreme court of Oklahoma. D. P. Gay and A. S. Reed, as partners as Gay & Reed, *et al.*, pl't'fs in error and appellees, *vs.* A. M. Thomas, J. B. Hart, and H. B. Owen, as the board of county commissioners of Kay county, Oklahoma Territory, *et al.*, def'ts in error and appellant. Citation. Filed Nov. 19th, A. D. 1896. Edgar W. Jones, clerk sup. court.

37 In the Supreme Court of the United States of America.

THE UNITED STATES OF AMERICA, }  
*Territory of Oklahoma,* }<sup>ss:</sup>

To A. M. Thomas, J. B. Hart, and H. B. Owen, as the board of county commissioners of Kay county, Oklahoma Territory; J. H. Lane, as county clerk of Kay county, Oklahoma Territory; S. J. Smock, as the county treasurer of Kay county, Oklahoma Territory, and H. C. Masters, as the sheriff of Kay county, Oklahoma Territory:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, at the city of Washington, in the District of Columbia, on the 20th day of December next, pursuant to a cross-appeal filed in the office of the clerk of the supreme court of the Territory of Oklahoma, and which said cause is entitled in the supreme court of the Territory of Oklahoma as follows: "In the supreme court of the Territory of Oklahoma. D. P. Gay and A. S. Reed, as partners as Gay & Reed; A. M. Miller and J. B. Johnson, as partners as Miller & Johnson; M. Halff and S. Halff, as partners as Halff Brothers; R. H. Harris, W. C. Harris, and William Childers, as partners as Harris Brothers & Childers; E. T. Comer and H. C. Comer, as partners as Comer Brothers; J. H. Carney, G. M. Carpenter, Virgile Herard, G. T. Hume; W. F. Smith and W. L. McCauley, as partners as Smith & McCauley; W. F.

Smith, W. W. Irons, A. I. Adams; A. I. Adams and Neal Shafer, as partuers as Adams & Shafer; C. W. Burt, F. M. Hewins, I. D. Har-  
 kleroad; Douglas Pierce and J. T. Crump, as partners as Pierce &  
 Crump; James Stone, W. M. Holloway, Jesse H. Pugh, R. H. Mose-  
 ley, Drury Warren, J. T. Moore, J. M. Slater, and R. W. Prosser,  
 plaintiffs in error, against A. M. Thomas, J. B. Hart, and H. B.  
 Owen, as the board of county commissioners of Kay county, Okla-  
 homa Territory; J. H. Lane, as the county clerk of Kay  
 38 county, Oklahoma Territory; S. J. Smock, as the county treas-  
 urer of Kay county, Oklahoma Territory, and H. C. Masters,  
 as sheriff of Kay county, Oklahoma Territory, defendants in error,"  
 and in which said cause you have, on the 18th day of November,  
 A. D. 1896, filed an appeal, and in which said cause the said plain-  
 tiffs in error in the said supreme court of the Territory of Oklahoma  
 have also filed a cross-appeal, to then and there show cause, if any  
 there be, why the judgment rendered against the said plaintiffs in  
 error in said supreme court of Oklahoma Territory should not be  
 reversed on their assignment of errors in their said cross-appeal,  
 and why the said judgment of the supreme court of Oklahoma Ter-  
 ritory should not be corrected and why speedy justice should not be  
 done in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the  
 United States, this 20th day of November, in the year of our Lord  
 one thousand eight hundred ninety-six, and of the Independence  
 of the United States of America the one hundred twenty-first.

FRANK DALE,

*Chief Justice of the Supreme Court  
 of the Territory of Oklahoma.*

Attest: — — —, Clerk.

We hereby, on this 20th day of November, A. D. 1896, accept due  
 personal service of this citation on behalf of the said A. M. Thomas,  
 J. B. Hart, and H. B. Owen, as the board of county commissioners  
 of Kay county, Oklahoma Territory; J. H. Lane, as the county clerk  
 of Kay county, Oklahoma Territory; S. J. Smock, as the county  
 treasurer of Kay county, Oklahoma Territory, and H. C. Masters,  
 as sheriff of Kay county, Oklahoma Territory, appellants and cross-  
 appellees.

D. L. WEIR,

*Co. Att'y, Kay Co., Oklahoma, and  
 BLEVINS & KING,*

*Attorneys and Solicitors for Appellants and Cross-appellees.*

[Endorsed:] In the Supreme Court of the United States. Gay &  
 Reed *et al.* vs. A. M. Thomas *et al.* Citation. Filed Nov. 20th, '96.  
 Edgar W. Jones, clerk, S.

## 39 In the Supreme Court of the Territory of Oklahoma.

D. P. GAY and A. S. REED, as Partners as Gay & Reed ;  
 A. M. Miller and J. B. Johnson, as Partners as Miller &  
 Johnson ; M. Halff and S. Halff, as Partners as Halff  
 Brothers ; R. H. Harris, W. C. Harris, and William  
 Childers, as Partners as Harris Brothers & Childers ;  
 E. T. Comer and H. C. Comer, as Partners as Comer  
 Brothers ; J. H. Carney, G. M. Carpenter, Virgil Herard,  
 G. T. Hume ; W. F. Smith and W. L. McCauley, as  
 Partners as Smith & McCauley ; W. F. Smith, W. W.  
 Irons, A. I. Adams ; A. I. Adams and Neal Shafer, as  
 Partners as Adams & Shafer ; C. W. Burt, E. M. Hewins,  
 I. D. Harkleroad ; Douglas Pierce and J. T. Crump, as  
 Partners as Pierce & Crump ; James Stone, W. M. Hol-  
 loway, Jesse H. Pugh, R. H. Mosley, Drury Warren,  
 T. J. Moore, J. M. Slater, and R. W. Prosser, Plaintiffs  
 in Error and Defendants to Cross-petition in Error,

No. 412.

vs.

A. M. THOMAS, J. B. HART, and H. B. OWEN, as the Board  
 of County Commissioners of Kay County, Oklahoma  
 Territory ; J. H. Lane, as the County Clerk of Kay  
 County, Oklahoma Territory ; S. J. Smock, as County  
 Treasurer of Kay County, Oklahoma Territory, and  
 H. C. Masters, as Sheriff of Kay County, Oklahoma  
 Territory, Defendants in Error and Cross-petitioners in  
 Error.

Know all men by these presents that we, A. M. Thomas, J. B. Hart, and H. B. Owen, county commissioners of Kay county, Oklahoma Territory ; J. H. Lane, county clerk of Kay county, Oklahoma Territory ; S. J. Smock, county treasurer of Kay county, Oklahoma Territory, and H. C. Masters, sheriff of Kay county, Oklahoma Territory, principals, and W. P. Jacobus, H. C. Brooks, J. M. Haynes, and Robert Sutherland, as sureties, are held and firmly bound unto D. P. Gay and A. S. Reed, partners as Gay & Reed ; A. M. Miller and J. B. Johnson, as partners as Miller & Johnson ; M. Halff and S. Halff, as partners as Halff Brothers ; R. H. Harris, W. C. Harris, and William Childers, as partners as Harris Brothers & Childers ; E. T. Comer and H. C. Comer, as partners as Comer Brothers ; J. H. Carney, G. M. Carroenter, Virgil Herard, G. T. Hume ; W. F. Smith and W. L. McCauley, as partners as Smith & McCauley ; W. F. Smith, W. W. Irons, A. I. Adams ; A. I. Adams and Neal Shafer, as partners as Adams & Shafer ; C. W. Burt, E. M. Hewins, I. D. Harkleroad ; Douglas Pierce and J. T. Crump, as partners as Pierce & Crump ; James Stone, W. M. Holloway, Jesse H. Pugh, R. H. Mosley, Drury Warren, T. J. Moore, J. M. Slater, and R. W. Prosser in the full and just sum of one thousand dollars, to be paid to the said D. P. Gay and A. S. Reed, as partners as Gay & Reed ; A. M. Miller and J. B. Johnson, as partners as Miller & Johnson ; M. Halff and S. Halff, as partners as Halff Brothers ; R. H. Harris,

W. C. Harris, and William Childers, as partners as Harris Brothers and Childers; E. T. Comer and H. C. Comer, as partners as Comer Brothers; J. H. Carney, G. M. Carpenter, Virgil Herard, G. T. Hume; W. F. Smith and W. L. McCauley, as partners as Smith & McCauley; W. F. Smith, W. W. Irons, A. I. Adams; A. I. Adams and Neal Shafer, as partners as Adams & Shafer; C. W. Burt, E. M. Hewins, I. D. Harkleroad; Douglas Pierce and J. T. Crump, as partners as Pierce & Crump; James Stone, W. M. Holloway, Jesse H. Pugh, R. H. Mosley, Drury Warren, T. J. Moore, J. M. Slater, and R. W. Prosser, their certain attorneys, executors, administrators, and assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 18th day of November, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at a session of the supreme court of the Territory of Oklahoma, in a suit depending in said court between D. P. Gay and A. S. Reed, as partners as Gay & Reed; A. M. Miller and J. B. Johnson, as partners as Miller & Johnson; M. Half and S. Hals, as partners as Half Brothers; R. H. Harris, W. C. Harris, and William Childers, as partners as Harris Brothers & Childers; E. T. Comer and H. C. Comer, as partners as Comer Brothers; J. H. Carney, G. M. Carpenter, Virgil Herard, G. T. Hume; W. F. Smith and W. L. McCauley, as partners as Smith & McCauley; W. F. Smith, W. W. Irons, A. I. Adams; A. I. Adams and Neal Shafer, as partners as Adams & Shafer; C. W. Burt, E. M. Hewins, I. D.  
 40 Harkleroad; Douglas Pierce and J. T. Crump, as partners as Pierce & Crump; James Stone, W. M. Holloway, Jesse Pugh, R. H. Mosley, Drury Warren, T. J. Moore, J. M. Slater, and R. W. Prosser, plaintiffs in error and defendants to cross-petition in error, and A. M. Thomas, J. B. Hart, and H. B. Owen, as the board of county commissioners of Kay county, Oklahoma Territory; J. H. Lane, as the county clerk of Kay county, Oklahoma Territory; S. J. Smock, as county treasurer of Kay county, Oklahoma Territory, and H. C. Masters, as sheriff of Kay county, Oklahoma Territory, defendants in error and cross-petitioners in error, a final judgment and decree was rendered against the said A. M. Thomas, J. B. Hart, and H. B. Owen, as the board of county commissioners of Kay county, Oklahoma; J. H. Lane, as the county clerk of Kay county, Oklahoma Territory; S. J. Smock, as county treasurer of Kay county, Oklahoma Territory, and H. C. Masters, as sheriff of Kay county, Oklahoma Territory; and the said A. M. Thomas, J. B. Hart, and H. B. Owen, as the board of county commissioners of Kay county, Oklahoma Territory; J. H. Lane, as the county clerk of Kay county, Oklahoma Territory; S. J. Smock, as county treasurer of Kay county, Oklahoma Territory, and H. C. Masters, as sheriff of Kay county, Oklahoma Territory, have prosecuted and been allowed an appeal to the Supreme Court of the United States to reverse the judgment and decree rendered in the above-entitled action by the supreme court of the Territory of Oklahoma on September 4th, A. D. 1896, and a citation directed to said D. P. Gay and A. S. Reed,

as partners as Gay & Reed; A. M. Miller and J. B. Johnson, as partners as Miller & Johnson; M. Halff and S. Halff, as partners as Halff Brothers; R. H. Harris, W. C. Harris, and William Childers, as partners as Harris Brothers & Childers; E. T. Comer and H. C. Comer, as partners as Comer Brothers; J. H. Carney, G. M. Carpenter, Virgil Herard, G. T. Hume; W. F. Smith and W. L. McCauley, as partners as Smith & McCauley; W. F. Smith, W. W. Irons, A. I. Adams; A. I. Adams and Neal Shafer, as partners as Adams & Shafer; C. W. Burt, E. M. Hewins, I. D. Harkleroad; Douglas Pierce and J. T. Crump, as partners as Pierce and Crump; James Stone, W. M. Holloway, Jesse H. Pugh, R. H. Mosley, Drury Warren, T. J. Moore, J. M. Slater, and R. W. Prosser, citing and admonishing them to be and appear in the Supreme Court of the United States, at Washington, D. C.:

Now, the condition of the above obligation is such that if the said A. M. Thomas, J. B. Hart, and H. B. Owen, as the board of county commissioners of Kay county, Oklahoma Territory; J. H. Lane, as the county clerk of Kay county, Oklahoma Territory; S. J. Smock, as county treasurer of Kay county, Oklahoma Territory, and H. V. Masters, as sheriff of Kay county, Oklahoma Territory, shall prosecute said appeal to effect and answer all costs and damages if they fail to make good their plea, then the above obligation to be void; else to remain in full force and virtue.

A. M. THOMAS,

J. B. HART,

H. B. OWEN,

*Board of County Commissioners of Kay Co.,  
Oklahoma Territory.*

[Seal Kay County, Oklahoma Ty.]

[SEAL.]

J. H. LANE,

*County Clerk of Kay Co., Oklahoma Territory.*

[SEAL.]

S. J. SMOCK,

*County Treasurer of Kay County, Oklahoma Ty.*

[SEAL.]

H. C. MASTERS,

*Sheriff of Kay Co., Oklahoma Territory.*

[SEAL.]

W. P. JACOBUS,

H. C. BROOKS,

J. M. HAYNES, AND

ROBERT SUTHERLAND.

[SEAL.]

[SEAL.]

[SEAL.]

The above and foregoing bond is taken and approved by me this 18th day of November, 1896.

FRANK DALE,

*Chief Justice.*

Sealed and delivered in the presence of—

IRA HILL,

T. J. BLEVINS.

J. F. KING.

Endorsed: In the supreme court, Oklahoma Territory. D. P. Gay and A. S. Reed, as partners as Gay & Reed, *et al. vs. A. M.*



Thomas, J. B. Hart, and H. B. Owen, as the board of county commissioners of Kay county, Oklahoma Territory, *et al.* Bond on appeal. Filed November 18th, 1896. Edgar W. Jones, clerk.

41 In the Supreme Court of the Territory of Oklahoma.

D. P. GAY and A. S. REED, as Partners as Gay & Reed; A. M. Miller and J. B. Johnson, as Partners as Miller & Johnson; M. Halff and S. Halff, as Partners as Halff Brothers; R. H. Harris, W. C. Harris, and William Childers, as Partners as Harris Brothers & Childers; E. T. Comer and H. C. Comer, as Partners as Comer Brothers; J. H. Carney, G. M. Carpenter, Virgil Herard, G. T. Hume; W. F. Smith and W. L. McCauley, as Partners as Smith & McCauley; W. F. Smith, W. W. Irons, A. I. Adams; A. I. Adams and Neal Shafer, as Partners as Adams & Shafer; C. W. Burt, E. M. Hewins, I. D. Harkleroad; Douglas Pierce and J. T. Crump, as Partners as Pierce & Crump; James Stone, W. M. Holloway, Jesse H. Pugh, R. H. Mosley, Drury Warren, T. J. Moore, J. M. Slater, and R. W. Prosser, Plaintiffs in Error and Defendants in Cross-petition in Error,

VERSUS

A. M. THOMAS, J. B. HART, and H. B. OWEN, as the Board of County Commissioners of Kay County, Oklahoma Territory; J. H. Lane, as the County Clerk of Kay County, Oklahoma Territory; S. J. Smock, as County Treasurer of Kay County, Oklahoma Territory, and H. C. Masters, as Sheriff of Kay County, Oklahoma Territory, Defendants in Error and Cross-petitioners in Error.

TERRITORY OF OKLAHOMA, }  
Kay County, } ss :

S. J. Smock, being first duly sworn, on his oath says: I am one of the defendants herein and the S. J. Smock mentioned in the above cause. I am and have been the county treasurer of Kay county, Oklahoma Territory, since the 8th day of January, A. D. 1895, and as such county treasurer have and during all of said time have had in my possession the books, papers, records, and belongings of said office. I have read and know the contents of the petition herein and on which the above cause was tried in the district court of the fourth judicial district within and for the county of Kay, in the Territory of Oklahoma, and I have read and know the contents of the judgment and decree of the said district court of Kay county, Oklahoma, rendered herein, and from which this appeal was prosecuted, and I have read and know the contents of the decree and decision of the supreme court of the Territory of Oklahoma rendered on the appeal and proceedings in error herein. I know and am familiar with the taxes, assessments, levies, and matters in controversy in this suit and the values and amounts thereof; that the taxes, the collection of which were enjoined by the judgment and decision of the said district and supreme court-herein,

amounted to more than sixteen thousand dollars, exclusive of penalties, interest, and costs, at the date of each of said judgments and decisions, and that no part of the same have been paid; that the same is claimed by cross-petitioners in error herein.

And I further swear that the amounts of said taxes enjoined as aforesaid was and is true, as aforesaid, as shown by the books and records of my said office.

S. J. SMOCK.

Subscribed and sworn to before me this 13th day of November, A. D. 1896.

[SEAL.]

FRANK B. APPERSON,

*Notary Public in and for Kay County, Oklahoma Territory.*

My com. exp. Dec. 18, 1897.

Endorsed: Supreme court of Oklahoma. D. P. Gay and A. S. Reed, as partners as Gay & Reed, *et al.*, plaintiffs in error and appellees, vs. A. M. Thomas, J. B. Hart, and H. B. Owen, as the board of county commissioners of Kay county, Oklahoma Territory, defendants in error and appellants. Affidavit of value. Filed November 18th, A. D. 1896. Edgar W. Jones, clerk supreme court.

42 In the Supreme Court of the Territory of Oklahoma.

D. P. GAY and A. S. REED, as Partners as Gay & Reed, *et al.*,

vs.

A. M. THOMAS, J. B. HART, and H. B. OWEN, as the Board of County Commissioners of Kay County, Oklahoma Territory, *et al.*

OKLAHOMA TERRITORY, } ss:  
Kay County,

Ira Hill, being first duly sworn, on his oath says: I have read and know the contents of the petition herein, and I have read and know the contents of the judgment of the district court of Kay county, Oklahoma Territory, rendered herein and from which the appeal and proceedings in error herein were prosecuted, and I have read and know the contents of the decision and judgment of the supreme court of Oklahoma rendered on the appeal and proceedings in error herein. I have examined the books, records, and papers of the county treasurer's office of Kay county, Oklahoma Territory, with reference to the levies, assessments, and taxes involved in the above suit and know the contents thereof; that I am acquainted with and know the said taxes, levies and assessments, and values and amounts thereof.

That the value and amount of the taxes enjoined by the decision and judgment of each of said courts herein is and was at the date of each of said judgments more than sixteen thousand dollars, exclusive of penalties, interest, and costs.

I am not a party to this suit nor in any manner interested in the result thereof.

IRA HILL.

Subscribed and sworn to before me November 13th, A. D. 1896.

[SEAL.]

FRANK B. APPERSON,  
Notary Public, Kay County, Oklahoma Territory.

My commission expires Dec. 18, 1897.

Endorsed: Supreme court of Oklahoma. D. P. Gay and A. S. Reed, as partners as Gay & Reed, *et al.*, plaintiffs in error and appellees, vs. A. M. Thomas, J. B. Hart, and H. B. Owen, as the board, &c., defendants in error and appellants. Affidavit of value. Filed November 18th, A. D. 1896. Edgar W. Jones, clerk supreme court.

43 In the Supreme Court of the Territory of Oklahoma.

D. P. GAY and A. S. REED, as Partners as Gay & Reed; A. M. Miller and J. B. Johnson, as Partners as Miller & Johnson; M. Halff and S. Halff, as Partners as Halff Brothers; R. H. Harris, W. C. Harris and William Childers, as Partners as Harris Brothers & Childers; E. T. Comer and H. C. Comer, as Partners as Comer Brothers; J. H. Carney, G. M. Carpenter, Virgil Herard, G. T. Hume; W. F. Smith and W. L. McCauley, as Partners as Smith & McCauley; W. F. Smith, W. W. Irons, A. I. Adams; A. I. Adams and Neal Shafer, as Partners as Adams & Shafer; C. W. Burt, E. M. Hewins, I. D. Harkleroad; Douglas Pierce and J. T. Crump, as Partners as Pierce & Crump; James Stone, W. M. Holloway, Jesse H. Pugh, R. H. Mosley, Drury Warren, T. J. Moore, J. H. Slater and R. W. Prosser, Plaintiffs in Error,

vs.

A. M. THOMAS, J. B. HART, and H. B. OWENS, as the Board of County Commissioners of Kay County, Oklahoma Territory; J. H. Lane, as the County Clerk of Kay County, Oklahoma Territory; S. J. Smock, as County Treasurer of Kay County, Oklahoma Territory, and H. C. Masters, as Sheriff of Kay County, Oklahoma Territory, Defendants in Error and Cross-petitioners in Error.

#### *Assignment of Errors.*

Now come the said defendants in error and cross-petitioners in error by D. L. Weir, county attorney of Kay county, Oklahoma Territory, and Blevins & King, their attorneys, and say that the judgment and decision in said cause is erroneous and against the just rights of said defendants and cross-petitioners in error, and that in the record and proceedings aforesaid there is manifest error in this, to wit:

First. The supreme court erred in affirming the judgment of the district court of Kay county, Oklahoma Territory, herein.

Second. The court erred in not reversing the said judgment dissolving *in toto* the injunction granted plaintiffs and granting to cross-petitioners the relief prayed in their cross-petition in error.

Third. The court erred in adjudging illegal and in enjoining the cross-petitioners in error and appellants from levying or attempting to levy or collect the following tax levies for county purposes:

For salaries, five mills;

For contingent fund, three mills;

For sinking fund, one and one-half mills;

For county supplies, three mills;

For road and bridge fund, two mills;

For poor fund, one mill;

For county school fund, three mills, and so erred as to each of them.

Fourth. That said judgment and decree should have adjudged each and all of said tax levies legal and aright in the cross-petitioners to proceed and collect the same.

Fifth. The court erred in decreeing that article six, chapter forty-three (43), laws of Oklahoma, 1895, approved March 5, 1895, providing for the levy and collection of taxes on personal property on the Indian reservations (other than property of the Indians) by the counties to which such Indian reservations are attached for judicial purposes, was, as to county taxes for salaries, for contingent fund, for sinking fund, for county supplies, for road and bridge fund, for poor fund, and for county school fund, unconstitutional, illegal, and void.

Wherefore they pray that the said judgment and decision be reversed and the said injunction dissolved, and for such other and further relief as may be just, equitable, and proper.

D. L. WEIR,

*County Attorney of Kay County, Oklahoma Territory, and*

BLEVINS & KING,

*Attorneys for Cross-petitioners in Error and Appellants.*

Endorsed: Supreme court of Oklahoma. D. P. Gay and A. S. Reed, as partners as Gay & Reed, *et al.*, pl'ffs in error and appellees, *vs.* A. M. Thomas, J. B. Hart, and H. B. Owen, as the board of county commissioners of Kay county, Oklahoma Ty., *et al.*, def'ts in error and appellants. Assignment of errors. Filed November 18th, A. D. 1896. Edgar W. Jones, clerk supreme court.

## 44 In the Supreme Court of the Territory of Oklahoma.

D. P. GAY and A. S. REED, as Partners as Gay & Reed; A. M. Miller and J. B. Johnson, as Partners as Miller & Johnson; M. Halff and S. Halff, as Partners as Halff Brothers; R. H. Harris, W. C. Harris, and William Childers, as Partners as Harris Brothers & Childers; E. T. Comer and H. C. Comer, as Partners as Comer Brothers; J. H. Carney, G. M. Carpenter, Virgil Herard, G. T. Hume; W. F. Smith and W. L. McCauley; W. F. Smith, W. W. Irons, A. I. Adams; A. I. Adams and Neal Shafer, as Partners as Adams & Shafer; C. W. Burt, E. M. Hewins, I. D. Harkleroad; Douglas Pierce and J. T. Crump, as Partners as Pierce & Crump; James Stone, W. H. HOLLOWAY, Jesse H. Pugh, R. H. Mosley, Drury Warren, T. J. Moore, J. M. Slater, and R. W. Prosser, Plaintiffs in Error,

*against*

A. M. THOMAS, J. B. HART, and H. B. OWEN, as the Board of County Commissioners of Kay County, Oklahoma Territory; J. H. Lane, as the County Clerk of Kay County, Oklahoma Territory; S. J. Smock, as the County Treasurer of Kay County, Oklahoma Territory, and H. C. Masters, as Sheriff of Kay County, Oklahoma Territory, Defendants in Error.

*Cross-assignment of Errors on Appeal.*

Now, on this 20th day of November, A. D. 1896, come the said plaintiffs in error in this court by Asp, Shartel & Cottingham, their attorneys and solicitors, and say that the decree in said cause is erroneous and against the just rights of the said plaintiffs for the following reasons:

First. Because the said court erred in affirming judgment of the court below, whereas the said order of this court should have been a reversal of the judgment of the court below for the reason that the property of the plaintiffs was and is liable for none of the taxes by said court in said judgment declared to be legal and valid.

Second. Because the said Osage and Kaw Indian reservations attempted to be attached to the said county of Kay for judicial purposes are no part of said county of Kay for the purposes of taxation or for any municipal purposes whatever.

Third. Because the law attempting to impose said taxes is unconstitutional and void in the following particulars, to wit:

a. It is local and special legislation.

b. It violates the rule of uniformity prescribed in the organic act of said Territory.

c. It discriminates in the taxing system against the property of non-residents of said Territory.

Fourth. Because the said Osage and Kaw Indian reservations in which said property had its situs is no part of the Territory of Oklahoma for the purpose of taxation.

Fifth. Because the tax attempted to be imposed by said Legislative Assembly is a tax upon the Indian tribes occupying said reser-

vations and the members of said tribes in violation of the authority of Congress in the premises and of the treaty stipulations between the United States and said Indians and Indian tribes.

Wherefore the said plaintiffs in error allege that the said seven and one-tenth mills levy of the various taxes in controversy in this cause, which were held to be valid by the district court of the county of Kay and Territory of Oklahoma, and which said holding is affirmed by the decree herein appealed from, is erroneous, and the said plaintiffs in error pray that said decree be reversed in respect to the said four and six-tenths mills on the dollar of valuation of territorial levies and two and one-half mills of county levies for court expenses be held to be null and void, and that the said  
45 cause be remanded to the supreme court of said Territory with directions that judgment be entered reversing the action of the district court of Kay county and directing that judgment be entered in favor of the said plaintiffs in error as in their petition in the court below alleged and claimed abating and enjoining the collection of all of the taxes attempted to be levied against the property of these plaintiffs in error by the said defendants in error in said county of Kay and Territory of Oklahoma.

HENRY E. ASP,  
JOHN W. SHARTEL AND  
JAMES R. COTTINGHAM,

*Attorneys and Solicitors for Plaintiffs in Error.*

Endorsed: In the supreme court of Oklahoma Territory. D. P. Gay *et al.* vs. A. M. Thomas *et al.* Cross-assignment of errors on appeal. Filed November 20th, 1896. Edgar W. Jones, clerk supreme court.

46 UNITED STATES OF AMERICA, {  
Territory of Oklahoma, } 88 :

I, Edgar W. Jones, clerk of the supreme court of the Territory of Oklahoma, do hereby certify the above and foregoing papers, numbered from one to 45, all numbers inclusive, to be a full, true, perfect, and complete transcript and copy of the record, papers, and proceedings, and of all thereof filed or had and entered of record in said court and in a certain cause lately in said court pending, wherein D. P. Gay and A. S. Reed, as partners as Gay & Reed; A. M. Miller and J. B. Johnson, as partners as Miller & Johnson; M. Half and S. Half, as partners as Half Brothers; R. H. Harris, W. C. Harris, and William Childers, as partners as Harris Brothers & Childers; E. T. Comer and H. C. Comer, as partners as Comer Brothers; J. H. Carney, G. M. McCauley, as partners as Smith & McCauley; W. F. Smith, W. W. Irons, A. I. Adams; A. I. Adams and Neal Shafer, as partners as Adams & Schafer; C. W. Burt, E. M. Hewins, I. D. Harkleroad; Douglas Pierce and J. T. Crump, as partners as Pierce & Crump; James Stone, W. M. Holloway, Jesse H. Pugh, R. H. Mosely, Drury Warren, T. J. Moore, J. M. Slater,



and R. W. Prosser were plaintiffs in error and defendants to cross-petition in error and A. M. Thomas, J. B. Hart, and H. B. Owen, as the board of county commissioners of Kay county, Oklahoma Territory; J. H. Lane, as the county clerk of Kay county, Oklahoma Territory; S. J. Smock, as county treasurer of Kay county, Oklahoma Territory, and H. C. Masters, as sheriff of Kay county, Oklahoma Territory, were defendants in error and cross-petitioners in error, as fully and completely as the same still remain on file or of record in my office, at Guthrie, Oklahoma Territory.

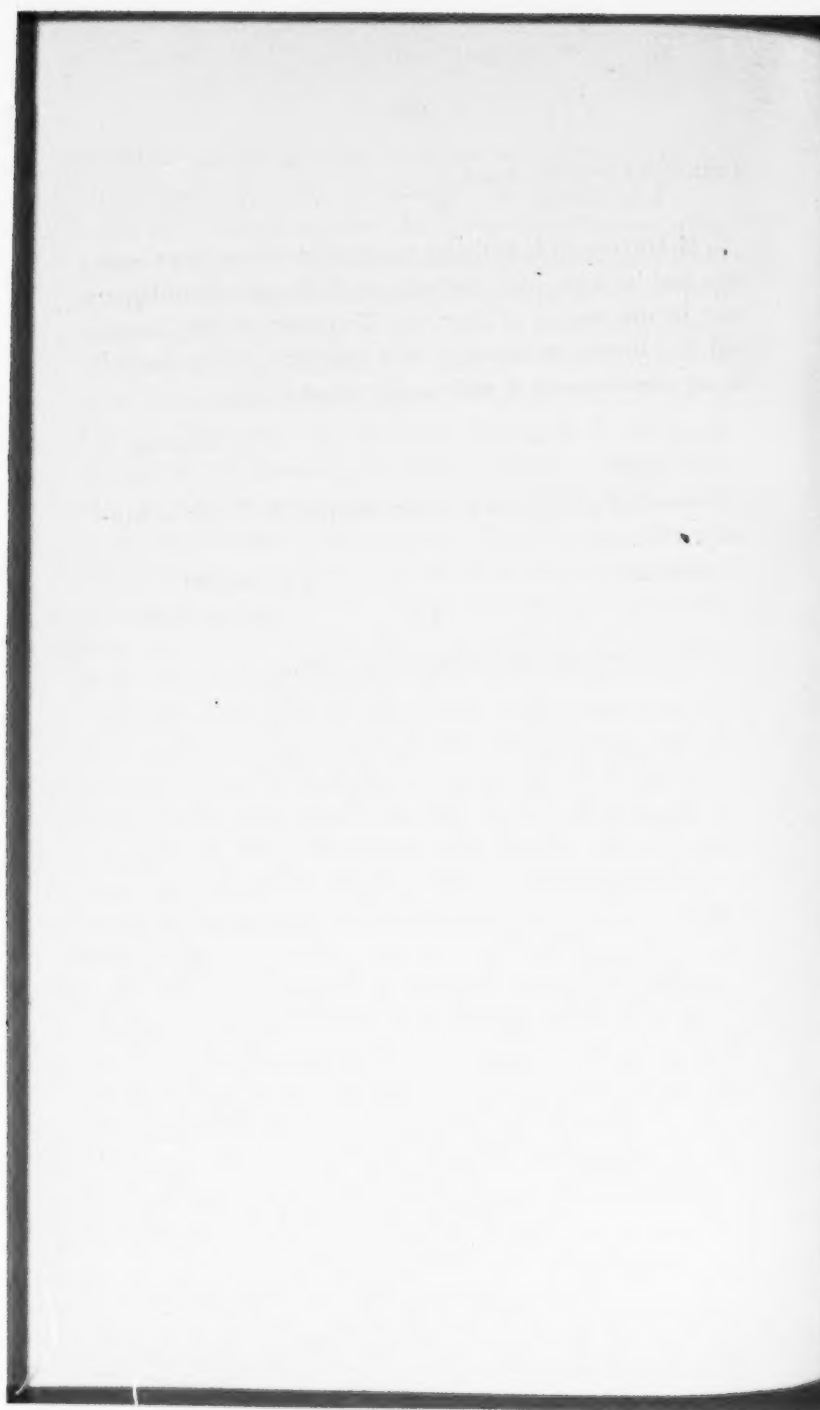
I further certify that the original citations herein are each and both hereto attached and herewith returned with the acceptance of service thereof duly endorsed on each.

In testimony to the above I do hereunto sign my name and affix the seal of said court, at Guthrie, in said Territory, this 16th day of December, A. D. 1896.

[Seal Supreme Court, Territory of Oklahoma.]

EDGAR W. JONES,  
*Clerk of the Supreme Court.*

Endorsed on cover: Case No. 16,467. Oklahoma Territory, supreme court. Term No., 287. A. M. Thomas, J. B. Hart, and H. B. Owen, as the board of county commissioners of Kay county, Oklahoma Territory, *et al.*, appellants, *vs.* D. P. Gay and A. S. Reed, partners as Gay & Reed, *et al.* Filed January 15th, 1897. Case No. 16,652. Term No., 439. D. P. Gay and A. S. Reed, partners as Gay & Reed, *et al.*, appellants, *vs.* A. M. Thomas, J. B. Hart, and H. B. Owen, as the board of county commissioners of Kay county, Oklahoma Territory, *et al.* Filed August 20th, 1897.



N. 287.

JAMES H. McKENNEY,

CLERK

*Brief of King for Appellants.*  
Supreme Court of the United States.

OCTOBER TERM, 1897.

*Filed Oct. 1, 1897.*

No. 287.

A. M. THOMAS, J. B. HART and H. B. OWEN, as the BOARD  
OF COUNTY COMMISSIONERS OF KAY COUNTY,  
OKLAHOMA TERRITORY, *et al.*,

*Appellants,*

*vs.*

*h*

D. P. GAY and A. S. REED, as partners as GAY & REED *et al.*

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF  
OKLAHOMA.

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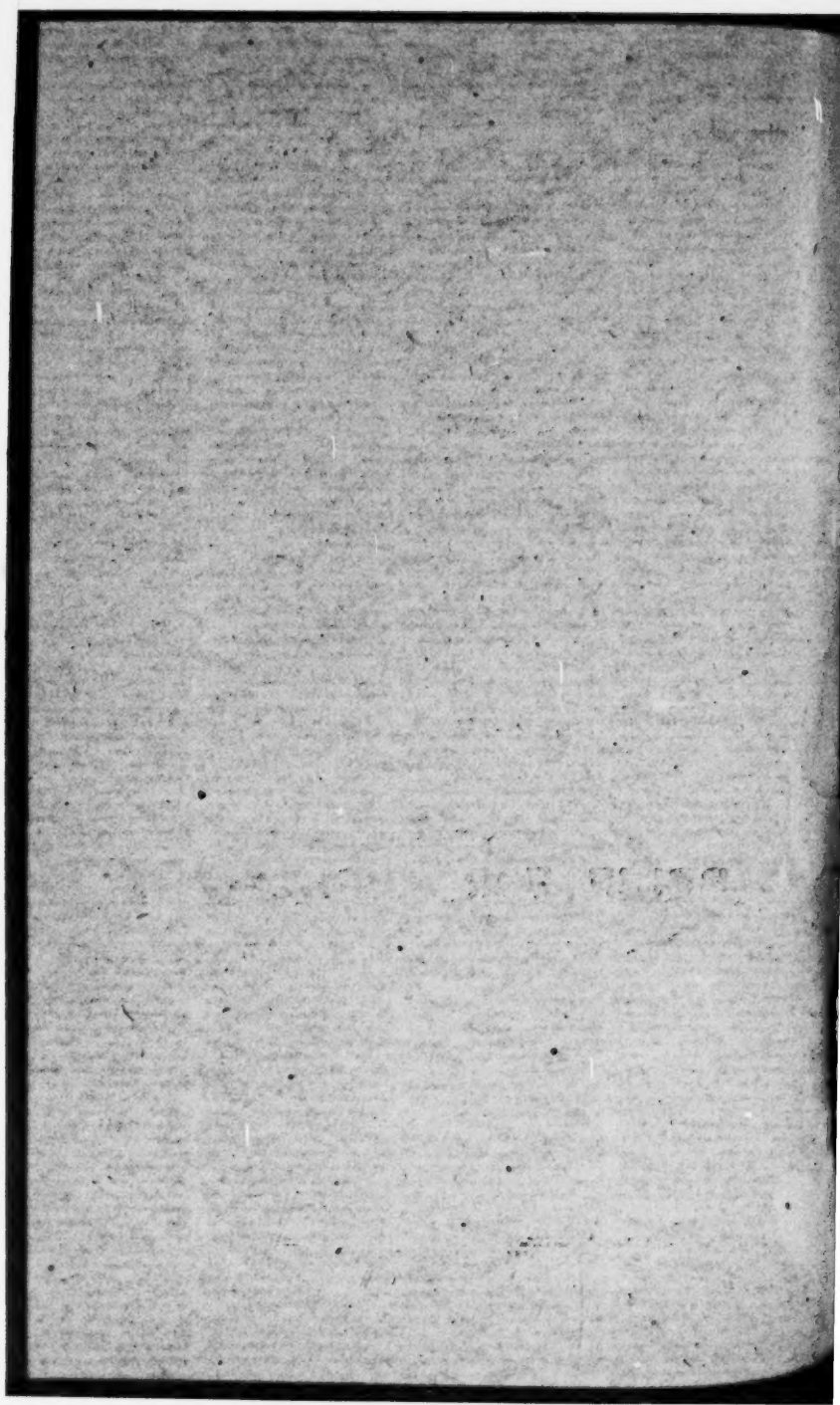
**BRIEF FOR APPELLANTS.**

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J. F. KING,

*Counsel for Appellants.*



IN THE  
Supreme Court of the United States.

OCTOBER TERM, 1897.

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No. 287.

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A. M. THOMAS, J. B. HART and H. B. OWEN, as the Board of County Commissioners of Kay County, Oklahoma Territory; J. H. LANE, as the County Clerk of Kay County, Oklahoma Territory; S. J. SMOCK, as County Treasurer of Kay County, Oklahoma Territory; and H. C. MASTERS, as Sheriff of Kay County, Oklahoma Territory,  
*Appellants.*

vs.

D. P. GAY and A. S. REED, partners as Gay & Reed; A. M. MILLER and J. B. JOHNSON as partners, as Miller & Johnson; M. HALFF and S. HALFF as partners, as Halff Brothers; R. H. HARRIS, W. C. HARRIS and WILLIAM CHILDERS as partners, as Harris Brothers & Childers; E. T. COMER and H. C. COMER, as partners, as Comer Brothers; J. H. CARNEY; G. M. CARPENTER; VIRGIL HERARD; G. T. HUME; W. F. SMITH and W. L. McCAULEY, as partners, as Smith & McCauley; W. F. SMITH; W. W. IRONS; A. I. ADAMS; A. I. ADAMS and NEAL SHAFER as partners, as Adams & Shafer; C. W. BURT; E. M. HEWINS; I. D. HARKLEROAD; DOUGLASS

PIERCE and J. T. CRUMP, as Partners as Pierce & Crump; JAMES STONE; W. M. HOLLOWAY; JESSE H. PUGH; R. H. MOSLEY; DRURY WARREN; T. J. MOORE; J. M. SLATER; and R. W. PROSSER.

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*Appeal from the Supreme Court of the Territory of Oklahoma.*

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### BRIEF FOR APPELLANTS.

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#### STATEMENT OF CASE.

(The Statutes of Oklahoma involved in this case are printed at large in the appendix to this brief.)

This is an action in which the county officials of Kay county, Oklahoma Territory, were on the petition of appellees, permanently enjoined by the decree of the District Court of that county from collecting certain county taxes, levied upon the property of white citizens situated on the Indian reservations attached to that county for judicial and revenue purposes. The county appealed from this decree to the Territorial Supreme Court where the decree was in all particulars affirmed and now appeals to this Court.

The question in this case being, whether or not the Territorial Legislature exceeded its powers under the Organic Act in providing for the taxation, for county purposes, of the personal property of white citizens, situated upon the Indian Reservations attached for judicial and revenue purposes to that county. The petition



being a joint petition within the principle announced in *Washington Market Co. vs. Hoffman*, 101 U. S., 112; and the decree a single decree, enjoining about \$20,000 in taxes, excluding penalties, interest and costs. The more than \$30,000 involved in this case being as nothing, compared with the right of the various counties to tax the personal property of white citizens, upon all the Indian Reservations in Oklahoma—this being a test case. The facts are substantially as follows: The Organic Act of Oklahoma Territory, Act of May 2, 1890 (26 Stat. at L., 81), included all of the Kaw and Osage Indian Reservations, together with many other Indian Reservations, within the boundaries of that territory. There is nothing in the Organic Act, nor in any law of Congress, nor in any treaty with the Indians, which directly or by inference excepts these reservations out of the territory for any purpose. The Organic Act, Section 9, provides:

“And the territory not embraced in organized counties, shall be attached for judicial purposes, to such organized county or counties as the Supreme Court may determine.”

In pursuance of that Act, the Territorial Supreme Court, on the third Monday of February, 1894, attached the Kaw and a portion of the Osage Indian Reservations to Kay County for judicial purposes; and the balance of said reservations, and all other Indian reservations, to the various other organized Counties in that Territory. (Record, page 9). The Territorial Legislature, by an Act passed March 5th, 1895, Article 6, Chapter 43, Laws of 1895, adopted these divisions as taxing districts, and provided for the assessment and taxation of all per-

sonal property thereon, other than the property of the Indians; and that the same should be taxable in the organized county to which the district was attached for judicial purposes. (Appendix, page 62).

In obedience to this legislation, the Board of County Commissioners of Kay County, for the year 1895, caused an assessment to be made of the property situated in the Indian country so attached to it, and in and for the same year duly levied the following taxes upon it and all taxable property in Kay County. (Record, page 13).

#### TERRITORIAL TAXES.

General revenue, three mills on the dollar; University fund, one-half mill on the dollar; Normal school fund, one-half mill on the dollar; bond interest fund, one-half mill on the dollar; Board of Education fund, one-tenth mill on the dollar.

#### COUNTY TAXES.

For salaries, five mills on the dollar; for contingent expenses, three mills on the dollar; for sinking fund, one and one-half mills on the dollar; for court expenses, two and one-half mills on the dollar; for county supplies, three mills on the dollar; for road and bridge fund, two mills on the dollar; for poor fund of said county, one mill on the dollar; for county school purposes, three mills on the dollar.

The taxes becoming due, the county officials were proceeding to collect them, when, on January 8th, 1896, the appellees began this suit by filing their joint petition in the District Court of Kay County, Oklahoma, alleging that Kay County was a part of the Cherokee outlet opened to settlement September 16th, 1893; that

immediately upon said opening a county government was established therein; that no part of said taxed district is within the Territorial bounds of Kay County; and that the Kaw and Osage Reservations are not, and never have been, a part of Oklahoma Territory for taxing purposes; "that the Supreme Court of the Territory of Oklahoma, on the third Monday in February, 1894, by order, duly entered on the Journal of said Court, attached to said County of Kay aforesaid all of the following Indian reservations and territory, to-wit: All of the Kaw, or Kansas Indian Reservation, and all of the Osage Indian Reservation north of the township line dividing townships 25 and 26," for judicial purposes, and judicial purposes only.

That the Territorial Legislature passed the Act above mentioned, providing for the assessments and taxation of personal property situated in any unorganized county, district or reservation in the county to which it was for judicial purposes attached.

That an assessment of all the personal property in the said territory, so attached to Kay County for judicial purposes, was made and returned to the County Clerk of Kay County, in the time provided by said Act.

That none of the plaintiffs at any time owned any property in Kay County proper. That the district so attached is comprised of Indian Reservations, and consist principally of wild, unimproved, and unallotted lands, which said wild, unimproved and unallotted lands, which were not needed for allotment, were leased to plaintiffs under the tribal governments under the control of the Commissioner of Indian Affairs, and the Sec-

retary of the Interior, for grazing purposes. That plaintiffs at the commencement of the grazing season for 1895, drove, transported and shipped, to the ranges and pastures in said Indian Reservations, large herds and quantities of cattle, which were taken on said Reservations in pursuance of, and by virtue and authority of, said leases, together with other articles of personal property necessary in the care of said cattle.

That the plaintiffs are all non-residents of the Territory of Oklahoma. That the greater portion of said property was for the year 1895, assessed and taxed in the States from which they were removed to said attached district. That none of said property of these plaintiffs was in Kay County, nor was the greater portion thereof within the said territory attached to said Kay County for judicial purposes, at the time when other property in Kay County was valued for taxation, to-wit, the first day of February, A. D. 1895, but that a greater part of the property of said plaintiffs attempted to be valued and assessed by the authorities of said County of Kay and Territory of Oklahoma, was located and removed into said territory attached to said Kay county for judicial purposes, after the first day of April, A. D. 1895, and before the first day of May, A. D. 1895. That the said cattle, by reason of natural growth and increase in the market value, and the improvement in their condition, had greatly and substantially improved and increased in value between the first day of February, A. D. 1895, and the first day of May, A. D. 1895.

That the same class and kind of property located in said Kay County, and also located and kept throughout

the Territory of Oklahoma, during the same period improved and increased in value likewise, and to the same extent; and the same class of property located in said territory did, during such period, greatly and substantially increase in value between such dates, and during the same time.

That the property of plaintiffs was assessed at \$760,-469.00. That the Territorial Board of Equalization raised the assessment of Kay County 35 per cent., which was carried out against the property of plaintiffs, raising said assessed valuation to \$1,026,634.00. That the valuation and assessment was made on the first day of May, 1895. That the taxes on said assessment amounted to \$26,174.16.

That the action of the Territorial Board of Equalization in attempting to raise the valuation of the property of the plaintiffs, and the action of the County Clerk in attempting to extend the same, and such raised valuation on the taxes for said county against said plaintiffs was null and void.

That the said assessment and levy of taxes was null and void, for the reasons that the act under which the assessment was made is local and special legislation. That said act makes an unequal discrimination in taxation, and for the reason that the residents of the attached territory have no voice in creating the indebtedness for the payment of which these taxes are levied, no voice in the election of the county officials, and derive no benefit from said taxes. And pray an injunction against the collection of said taxes. (Record page 7). To this petition defendants filed a general demurrer, (Record page



17), and upon the trial of the issues thus raised the Court sustained the demurrer, and dissolved the temporary injunction as to all the territorial levies and the county levy for court expenses, and overruled the demurrer and granted a perpetual injunction against the defendants levying or attempting to levy or collect, the balance of said county levies.

From this decree both parties appealed to the Territorial Supreme Court, where the decree was in all particulars affirmed; and the appellants (defendants in the trial court) now appeal to this court.

This case stands on petition and demurrer. Appellants contend, however, that the ninth subdivision of appellee's petition contains no statement of fact; that it is the legal conclusions of the pleader, from the previous statements of fact, and therefore not admitted by the demurrer. (Record, page 14). That it is but the reasons and conclusions of the pleader, and so expressly stated to be by him, at the outset in the framing of said subdivision or paragraph.

If we understand the law, a general demurrer admits only such facts as are well pleaded; and it particularly does not admit the conclusions of law of the pleader from his previous statement of facts in the petition or pleading attacked.

Appellants further contend, that the general charge in the ninth subdivision of appellee's petition, that they derive no benefit from these various county levies, is as consistent with the theory that the county officials have the legal right to levy and collect these taxes, but that, disregarding their official duties, they do not expend



them for the benefit of these people; as it is with the theory that the legislature has exceeded its authority in providing for the levy of the taxes.

While the law presumes that county officials do their duty, yet this presumption, we think, would give way to the stronger presumption, that the legislature, a co-ordinate and co-equal branch of the government, had not abused its authority and passed an unconstitutional law.

That these statements in the ninth subdivision of plaintiff's petition are not admitted by the demurrer, we understand to be the holding of both the trial and the territorial Supreme Court. For in each instance the territorial taxes were upheld, notwithstanding the allegation in the ninth subdivision of plaintiff's petition: "That the Osage Indian Reservation, and the said Kaw Indian Reservation, are not properly a part of the Territory of Oklahoma for the purpose of taxation for territorial purposes, nor do the residents of said Indian reservations participate in the benefits of the territorial government, but that the said taxation throughout is taxation for a private, and not for a public use, and is an illegal and unequal exaction, not in behalf of and for the use and benefit of the Territory of Oklahoma and the Courts therein, but is exacted for the private use and benefit of the residents of said Territory;" and the case must have been decided by both Courts, only upon the facts set forth in plaintiff's petition previous to the ninth subdivision thereof. And we fail to understand, and we believe the Court will fail to find, that the Act in question is unconstitutional, and the taxes illegal upon the showing so made.

While we believe we are correct in this contention, we will ask the indulgence of the Court, further along, to invoke its judicial notice of what are and are not benefits to the taxpayer, if benefits are necessary to sustain taxes, and to the further contention of appellants, that not benefits but equality of sacrifice is the rule in the apportionment and levy of taxes.

### **ASSIGNMENT OF ERRORS.**

1. The District Court below erred in giving judgment and decree in favor of plaintiffs, (appellants herein) decreeing them and granting a perpetual injunction, forever and perpetually enjoining and restraining defendants (appellants herein), from levying or collecting or attempting to levy or collect, either or any of the following named taxes for the year 1895, to-wit: For salaries, for contingent fund, for sinking fund, for county supplies, for road and bridge fund, for county poor fund, and for county school fund; and the Supreme Court of Oklahoma Territory erred in affirming the same, because the facts do not justify such decree, and the said decree is contrary to law.

2. The District Court below erred in its finding and conclusion of law, that the property of plaintiffs below, (appellees herein) "located in the Kaw Indian Reservation and in that part of the Osage Indian Reservation attached to the County of Kay for judicial purposes, is not subject to taxation in the said County of Kay for either, or any of the following County purposes, to-wit: For salaries, for contingent fund, for sinking fund, for county supplies, for road and bridge fund, for county poor fund, and for county school fund; for which total

levies are shown by said petition to have been made against the property of said plaintiffs, located in said Indian Reservations as aforesaid, of eighteen and one-half mills, which levies so attempted to be made against the property of the said plaintiffs, for the year 1895, is hereby adjudged to be null and void." Said finding being against the facts set forth in plaintiffs' petition, and against the law, and the Supreme Court of Oklahoma Territory erred in affirming the same.

3. The District Court below erred in overruling defendants' demurrer to plaintiffs' petition as to the following County levy of taxes, to-wit: For salaries, five mills; for contingent fund, three mills; for sinking fund, one and one-half mill; for county supplies, three mills; for road and bridge fund, two mills; for poor fund, one mill; for county school fund, three mills; and so erred as to each of said levies, and in rendering judgment against defendants, perpetually enjoining them, and each of them, from levying or attempting to levy or collect said taxes or any of them, and the said Supreme Court erred in affirming the same.

4. That the Supreme Court of the Territory of Oklahoma, and the District Court below, erred in finding and holding that Article 6, Chapter 43, Laws of Oklahoma Territory, 1895, approved March 5, 1895, was unconstitutional, void and beyond the powers of the Legislature of Oklahoma, in so far as it authorized or attempted to authorize a levy for County taxes for the following purposes: For salaries, for contingent fund, for sinking fund, for county supplies, for road and bridge fund, for poor fund, and for county school fund.

5. The said Supreme Court, and the District Court below, erred in holding said Article 6 unconstitutional and void in so far as it authorized, or attempted to authorize, Kay County, Oklahoma, and its Board of County Commissioners, and its duly authorized officials, to levy and and collect county taxes for salaries, for contingent fund, for sinking fund, for county supplies, for road and bridge fund, for poor fund, and for county school fund, upon property situated in the Kaw and that portion of the Osage Indian Reservations attached to said Kay County for judicial purposes.

6. The Supreme Court of Oklahoma Territory erred in not granting the relief prayed in the cross-petition in error, and in not reversing the judgment and decree of the District Court below, dissolving the said injunction in toto and decreeing each and all of said tax levies legal, and a right in the cross-petitioners to proceed and collect the same, and in not dismissing the suit of plaintiffs at their costs.

This assignment of error is stated somewhat differently from the way in which it was stated in the appeal papers, though, we think, in substance, the same. This, we understand, we may do under the rules of the Court.

### ARGUMENT.

In the language of the Court below (Record, page 32), the only question in this case is, "Did the Legislature, by the Act of 1895, under authority of which the taxes in controversy were assessed and levied, transcend its powers? And is such act a violation of any constitutional or other fixed general rule controlling the dis-

cretion of the Legislature?" And answered it by holding that the Legislature did so transcend its authority.

Appellants contend that the people upon these reservations do receive benefit, and adequate benefit, from the collection and expenditure of the taxes in question, and in addition contend for the following propositions. Though they are much broader and stronger than it is necessary to sustain in order to uphold these taxes, yet we believe they state the law :

#### I.

In the absence of treaty stipulation, personal property, other than Indian property, situated upon the Indian reservations within the boundaries of the States and Territories of the Union, is taxable for State, Territorial and all county purposes to the same extent, and for the same purposes, as personal property situated upon lands, the legal and equitable title to which is in white citizens of the particular State or Territory.

#### II.

Where unorganized territory is attached to an organized county for judicial and revenue purposes, the unorganized territory is within the legal boundaries of the organized county. "Pro hac vice the boundaries of the latter are enlarged so as to include the former, it is tantamount to this, one part of

the statute gives the territorial boundaries, the other provides what shall be for certain purposes the legal boundaries."

### III.

In the absence of constitutional prohibition, it is the right of the State or Territorial Legislature to provide for the taxation of all property situated within the legal boundaries of its organized counties for all county purposes, even though certain individuals in, or certain parts of particular counties, do not receive their share of the benefits resulting from the expenditure of the taxes so collected.

### IV.

It is for the legislative, and not the judicial department, to determine when an unorganized district, or county, has sufficient population, wealth, or other qualifications necessary to sustain organized county government; and until the unorganized country, or district, has attained to the necessary conditions, it may, during its infancy, be placed by the legislative department within the jurisdiction and care of an organized county for judicial and revenue purposes.

The Organic Act of the Territory of Oklahoma provides "That the legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United



States." This is the same measure of legislative power granted in the Organic Acts of Kansas and Iowa, and so far as we have examined, in the Organic Acts of the other Territories organized subsequent to Iowa.

We believe that it means the same thing to Oklahoma that it did to Iowa, and that therefore many of the refinements introduced into some of the late State Constitutions can have no application to Oklahoma. They are at least not found in the Constitution or laws of the United States, and therefore not binding on the Oklahoma Legislature.

Considering the fact that Congress adopted this as the measure of legislative power at an early date, before the refinements in modern legislation had become pronounced; that these Organic Acts were passed for a pioneer population, without complex or large business interests, necessitating many of the checks and refinements of populous, long settled, and wealthy States that have had long time and experience to nicely adjust, and carefully adopt, in the light of experience a refined and nicely discriminating system of laws; considering that at the time of the passage of the Organic Act of a Territory, the people are an inexperienced, pioneer population; that they will have to speedily adopt, and as speedily put into operation, an entirely new code of laws; and that from the want of time and experience these laws, as applied to their condition, must be crude; considering all these things, as no doubt Congress did in adopting this language, it is not to be supposed that Congress contemplated on their part a very refined or nicely adjusted system of laws, with nicely balanced

checks and restraints. A large measure of legislative power cannot well be imagined; and we would interpret it to mean, that in creating the legislative department and conferring upon it this measure of legislative power, Congress must be understood to have conferred the full and complete power as it rests in, and may be exercised by, a sovereign power generally, subject only to such restraints as it may see fit to impose, and to the Constitution and laws of the United States. This measure of legislative power is incompatible with the idea that the Territorial Legislature is a special agency for the exercise of specifically defined legislative powers. But rather is intrusted with general authority to make laws at discretion for the Territory generally, subject to the limitations noted.

As the only objection found to these taxes by any of the trial courts or the Territorial Supreme Court was, that the Territorial Legislature transcended its powers in providing for the levy of these taxes, because of the want of benefit to these appellees from their collection and expenditure, we will ask the indulgence of the Court to present that point first. This Court takes judicial notice of what are "public purposes" in the law of taxation, and for what taxes, when collected, may be expended. Which, if we understand it, is but saying this Court takes judicial notice of the law.

None of these taxes were for any permanent improvements, nothing but current expenses for the fiscal year.

Appellees were not taxed for any permanent improvements the use of which they could claim, or do claim,

would go to Kay County should they in future be separated from it.

Section 1788 of the Statutes of Oklahoma, 1893, provides: "They (the County Commissioners) shall submit to the people of a county at any regular or special election involving any extra outlay of money by the county, or any expenditures greater in amount than can be provided for by the annual tax, or whether the county will construct any court house, jail, or other public buildings, or aid or construct any road or bridge, and may aid in any enterprise designed for the county, whenever a majority of the people thereof shall authorize the same as hereinafter provided."

Kay County has not a permanent county building. It has not even a permanent county seat. There is no claim in appellees' petition that they were taxed for any permanent improvements, or any improvement that will remain and be valuable to the county after separation shall take place, should there be a separation from this attached country in the future.

These specific levies are provided for by Chapter 43, Article 2, Section 3, of the Laws of 1895, providing, among other things, as follows: "The levies for county purposes shall be a separate, specific and certain levy for the payment of salaries; a levy for court expenses not exceeding three mills; for the support of the poor, including insane, not exceeding two mills; for roads and bridges, not exceeding two mills; for county supplies, not exceeding three mills; for contingent fund, not exceeding three mills. The last item shall include all county expenses not properly chargeable against any

of the other funds hereinbefore provided for; and for a sinking fund to be paid in money, such rate as in the estimation of the Board of County Commissioners will pay one year's interest on all outstanding bonded debt of the county, together with such part of the principal as shall be by law required. Said fund to be applied, first, to the payment of the interest; and, second, to the payment of the principal."

"Such estimates shall contain the foregoing items, together with estimated amount of necessary revenue to be raised for each fund, and the rate of levy necessary to raise such revenue for each fund separate. \* \* And no levy of taxes shall be made for any other purpose or any greater amount than is specified in such estimate."

As there is no claim made by the appellees that any of these taxes were levied for the making or erection of any permanent improvements in Kay County, or that any election was held for such, as provided in the statute quoted, it is unnecessary to consider this branch of the subject further. The inhabitants of this attached territory have as much interest in, and derive at least as much benefit from these taxes, as do the inhabitants of Kay County.

This Court, in the case of *The United States vs. Pridgeon*, 153 U. S., 48, decided that these Indian Reservations were within the boundaries of Oklahoma Territory; that the laws of Oklahoma Territory were in force in them, superseding the United States Statutes previously in force. It is also said in that opinion: "The Courts created for the Territory of Oklahoma are clearly dual in their nature. They sit as territorial Courts to

administer the laws of the Territory and as Courts of the United States to administer the laws of the United States;" and this was held to apply to territorial offences committed on the Indian Reservations in that Territory.

We believe this Court has a right to determine in this case what these various County levies involved in this case mean, and for what purposes these various County funds can be expended, and we further believe, that the Court will define them to mean that they can be used only for the purposes which the Oklahoma Legislature says they can by an Act passed March 12, 1897. (Art. 8, Chap. 32, Laws 1897).

"Section 1. The salary fund shall be used only for the compensation of the County Treasurer, County Attorney, County Clerk, Sheriff, Coroner, County Superintendent, Assessors and County Commissioners.

"Sec. 2. The Court funds shall be used only for the payment of witnesses, jurors, stenographers, bailiffs, janitors for the District Court, and the fees of Justices of the Peace, Probate Judge, Constables, and Clerks of the District Court, and in addition in Counties which have heretofore or which may hereafter construct court houses or jails, to be paid for by an annual rental, such rental shall be a proper charge against the Court fund, and an additional levy, not exceeding three mills, may be made for that purpose.

"Sec. 3. The road and bridge fund shall be used only for the construction and maintenance of county bridges, and the opening and changing of roads, exclusive of grading, and the purchase or condemnation of the right of way for roads.

"Sec. 4. The poor and insane fund shall be used only for the maintenance of the poor and insane and their transportation, of necessary guards and attendants.

"Sec. 5. The supply fund shall be used, only, for the purchase of books, blanks, stationery, furniture, fuel.

lights, and other necessary supplies, and for rents, repairs and insurance.

"Sec. 6. All allowances properly chargeable against the county, not herein made chargeable to some other fund, shall be paid out of the contingent fund."

True, this Act was passed after the levy complained of. It may assist a county official but it cannot assist a Court in determining from what fund a bill should be paid, and we think the Court will agree with us, that the Act meant the same thing practically, if not exactly, in 1895 that it did after this explanatory statute.

It is the duty of the County Attorney to prosecute offenses against the territorial laws, and take care of the county and territorial interests in this attached territory, the same as though these lands belonged to white citizens and were within the geographical boundaries of Kay County. The Probate Judge has, by laws put in force by the Organic Act, and continued by the Territorial Legislature, a large criminal and civil jurisdiction over these reservations. He is his own clerk, he tries their cases, subpoenas their witnesses, does all the clerical work of his Court and office, or pays for it out of his own pocket; issues their marriage licenses, probates their wills, administers their estates, &c. He does for the people of these reservations everything that is done for the people of Kay County. The Sheriff is required by law to serve their summons, executions, and Court processes of all kinds, arrest offenders, preserve the peace and performs for them practically the same duties as he performs for the people of Kay County. The Sheriff draws his fees in criminal cases from the county. Where



he does not draw them from the county, of course neither the people upon these reservations nor the people of Kay county proper, are taxed to pay them.

The County Clerk must receive, file and look after their claims against the county; for instance, their witness fees, their claims for damages upon the County, roads and bridges, etc., etc. By the decision of the territorial Supreme Court in this case, he must keep an individual account with every person who owns a dollar's worth of property in these Reservations, by providing for and receiving the assessments on which is based the territorial and Court expense levies, and must spread their account upon the tax-roll, and it is but very little more labor to add the amount of the other funds, once the account is opened.

The Board of County Commissioners must provide for the assessment of their property, pass upon their bills against the County, and look after the County matters incident to that country in general. By the decision of the Trial and Supreme Court in this case, the County Treasurer must also keep an account with every taxpayer in this attached territory, collect and safely keep and pay out the territorial and Court expense funds held good. The Coroner must hold his inquests, and when the Sheriff is disqualified, act in his stead, and Assessors must be paid to assess their property. (The cost of assessing this country, attached to Kay County, for 1895, being over eleven hundred dollars). This Court takes judicial notice, because it is the law, that these officers must all do these things.

Then is it morally or legally right that these people

should be excused from contributing a cent towards the salaries of these officers? This levy for salaries is payable only for salaries of the county officials. Having township government each township pays the salaries and fees of the township officers. Every one of these officers performs practically the same services for the people on these reservations that they do for the people of Kay County proper.

#### COUNTY SUPPLIES.

"Section 5. The supply fund shall be used only for the purchase of books, blanks, stationery, furniture, fuel, lights, and other necessary supplies, and for rents, repairs, and insurance."

The judgments, marriage licenses, mortgages, and wills of the people on these reservations are entered upon the blank books, blanks, and records of, and by pens and ink and stamps paid for by Kay County. They use the furniture of all the county offices. The court house is insured and repaired for their benefit as much as anybody else. Their attorneys and themselves come to the court house, sit down in chairs and at desks paid for by county money and on the 8th day of January, warmed by fires paid for by the county out of the supply fund, present a petition to the court praying an injunction against the collection of taxes for the supply fund on the ground that they derive no benefit from it. And the court picks up a pen paid for out of this fund, and with ink paid for out of this fund, records in a docket paid for out of this fund, that the claim is true and that the writ should go. If there is anything purchased or that can be lawfully purchased out of the supply fund that these people on these reservations do not

use and enjoy to the same extent as the residents of Kay County proper, we would be very thankful to the counsel for the appellees to point it out to the Court.

#### ROAD AND BRIDGE FUND.

Judge Cooley in his work on Taxation, 2nd Ed., p. 82, says:

"Roads and Bridges—In a certain sense they are of local concern because the local organizations construct and support them, but they are constructed for the general benefit and use of all the people, and are only turned over to the localities as a matter of apportionment."

They are in fact and in law the "king's highways," the roads of the State or Territory. It would appear that all the people of a State or Territory ought to contribute to what is really a State or Territorial work. But the people of these reservations receive as much, and as a rule, more benefit from these roads and bridges than the people of the county to which they were attached. This Court takes judicial notice that these people must come to the county seat to try their lawsuits, pay their taxes, and transact their business with the county and Territory in general. That under the law there cannot be, and in fact, there is not any cities or towns in these reservations. Therefore, these people do come, and have to come, to the towns in these organized counties to buy their supplies and to do their business generally, they must travel, and do travel, at least from the geographical boundary of the county to where the town may be. New-kirk, the county seat of Kay County, is the nearest county seat to any of these reservations. Yet the nearest road from this attached country to this town is six miles, and from that to twenty miles—on an average, about ten

miles. Considering that we have about five towns in Kay County, it is found that the people in this attached territory travel over a greater extent of the roads of Kay County than the people on an average in Kay county do. And in Pawnee County, and others where the county seat is much farther from the county line, they must certainly use them much more than the people of those particular counties. Then some of the people in the eastern end of this attached territory trade in Kansas towns but the roads in Kay County are very much used by the people from Kansas, and why should not these people help make roads for the Kansas people in return for the use of their roads? Is not this the system which the Statutes and Laws of the United States and of the states generally have sought to accomplish—comity between the States and Territories?

Can a farmer living one mile from town legally refuse to pay more than one-fifth of the road tax of the farmer who lives five miles from town?

The tax in question is but a small part of the road tax paid by the people of Kay County. Every man in Kay County is required to pay a poll tax, which is all expended upon the roads. Then the county is divided into road districts, and each road district grades and takes care of its own road beds, to none of which these appellees are required or asked to contribute. And as the law before Kay County was opened to settlement (and it has remained the law ever since) made every section line a public road, (giving a road free on two sides of every farm) it is apparent that very little land is pur-

chased for roads, and no permanent bridge can be built without a vote of the people.

#### POOR FUND.

As shown by the quotation from the statute, part of this fund is also expended in taking care of the insane. In the sense that benefit is used by the appellees, what taxpayer in Kay County derives any benefit from money raised by taxes for the care of the poor? Insanity in Oklahoma is determined by a judicial proceeding in the Probate Court (Chapter 42, Laws 1893), as is done in the States generally.

The attachment for judicial purposes carries with it the duty of the courts to pass upon the question of insanity, and as a consequence the county must pay the expense. Congress certainly did not intend that the courts should convict criminals and find people insane, and then turn them loose for the want of means of confining them. We think it is clear, from the acts of Congress and the Territorial Legislature, that it was intended that Kay County should take care of the poor and insane of this attached district. But suppose this were not true. Your Honors would take judicial notice of the fact that a starving man would seek relief at the nearest point where relief could be had, and that naturally these poor people would settle in the contiguous territory of Kay County, and become a charge upon that county. If there was no public provision for the poor in Brooklyn would not New York City become the early abiding place of the public charges of Brooklyn? Is it not the duty of all the people of a State or Territory to con-

tribute to the support of the poor and insane of that State or Territory ? The casting of the burden by the Legislature upon the counties is a mere matter of apportionment. It does not make the duty any more sacred. It would not add to the moral obligation had the Territory levied the tax under the head of Poor Fund, and taken care of all the poor and insane in the Territory. It would appear from the decision of the Territorial Supreme Court that if the Territory itself had levied a tax to take care of all the poor and insane in the Territory, it would be legal. But when it is apportioned to the counties as the statutes do, it is held unconstitutional. We would think that justice would impel them to pay it to that county where they continually bring their poor and insane to be taken care of out of the county treasury.

These unfortunate people under the law, and in fact, are just as well taken care of by the officials of Kay County as though they were within its geographical boundaries.

#### FOR SCHOOL PURPOSES.

The people on these Reservations have certainly an interest in the rising generation, that an intelligent race of voters may exist, and that this government may live. That from the Township Constable to the President of the United States, their persons and property, and that of their children, may be protected in all their rights; and they certainly owe something to the Territory, the future State, that she may take her place worthily by her sister States. By helping to educate Kay County they aid directly the United States. This is not the



school district tax. Under the laws of Oklahoma, as is the law in the States, generally, each school district must build its own school house, keep it in repair, and furnish the same with necessary fuel and appendages, and maintain such school as they are able within a two per cent. levy. (Okla. Laws, 1895, Chap. 45, Art. 7).

But experience has taught the various State and Territorial Legislatures that some school districts are rich, and some are poor and unable to maintain a school for many months in the year; so, in addition to the school tax which such school district levies, a tax for school purposes is levied on all the property in the County, and the County School Superintendent is required to apportion these school taxes among all the school districts in the County, in proportion to the number of school children in each school district; (St. of Oklahoma, 1893, Sec. 5752,) and similar laws are in force in most if not all the States.

The very foundation of this school tax, its basic idea, is the taking from those who have, and the giving to those who have not. If the objection of appellees is good, that before a tax can be collected the County must be legally bound to spend it upon the particular people who paid it, then the people in the rich school district in which is situated the County Seat, can most justly complain in the Courts of being compelled to contribute to the poor school district in a remote part of the County, that they contribute vastly more in proportion to the latter district than it contributes to them. Is it not a violation to the extent of the surplus contribution of the principle contended for by appellees?

The duty of all the people of the United States to contribute a fair share of their individual property to the support and upbuilding of the public school system; that this, the best government on earth, might live, that it may in the future, as in the past, continue to protect them in their lives and their property, is surely ample compensation for the tax. This is the compensation that people in Massachusetts and New York get for consenting that the public domain in Kansas and Missouri may be given to these States for the upbuilding of their State Universities. But these people receive ample direct benefits from this school tax.

Writers upon political economy and upon taxation tell us, that non-residents and residents who do not send, or have not the children to send to school, do receive ample benefit from school taxes, and assign three reasons. By schools a just and efficient government is built up, by which they are protected in their lives and their property, the labor for which they pay is better performed, and a market is created for whatever they produce. (Wayland's Pol. Econ. pt. 4, chap. 3, sec. 1. Cooley on Taxation, 120.) And these people are receiving all these benefits, if not all from Kay County and Oklahoma, yet from people who in turn are helped and assisted in these respects by Kay County and Oklahoma.

No doubt several of these appellees, if not all, have children going to the public schools in counties in Texas, in Kansas, etc., without contributing a share of this their property to their support. And no doubt there are people living in Kay County who own property in the counties where some of these appellees live, and help educate

their children. And no doubt there are people living in Kay County, who own property in, and help educate the children in counties in Kansas, Texas, etc., whose parents own property in and help educate the children of appellees in the counties where they live. These things may go around in a circle, but they accomplish in the end even-handed justice, as the fathers designed that County and State government should do. Does Massachusetts and New York receive no benefit from the thousands of good and brilliant men and women they have educated and sent west? Did it pay? Do they regret it? Could a public school system have been built up in this country on the lines indicated by appellees? But these people are by the Organic Act put under the governmental care and protection of Kay County. The only guarantee of their personal or property rights is in the educated intelligence and efficiency of Kay County, and the measure of this intelligence and efficiency is the measure of its public schools. And many of the people on these reservations educate their children in Kay County schools. It is a benefit to have schools and churches and civilization brought to their doors.

But suppose that none of these propositions applied to these reservations; it is morally certain that whatever money Kay County will get from this school fund, will be more than spent by Kay County in criminal costs, sheriff's fees, county expenses, loss of property, and losses generally incident to governing and taking care of a class of country that is notoriously, and historically the seat of crime and the abiding place of professional criminals.

As will appear in *U. S. vs. Kagama*, 118 U. S., 375, Kay County must pay the expense of the criminal prosecution of Indians for offenses against the Territorial laws—in the most serious offenses and the most costly to prosecute, and it cannot tax them.

We believe this Court will agree with us that it is cheaper to educate, than to take care of the criminals, and paupers, and insane, and suffer the losses that are always the consequences of ignorance, of children growing up in ignorance, and particularly in the surroundings on an Indian Reservation. The magazines of this country contain articles by able men, in public, and private life, showing by clear proof that the cost of taking care of criminals, and property loss as the consequence of permitting children in New York and other large cities to grow up in ignorance, and without attendance in the schools, is greater than the cost of providing schools. And a child in the streets of New York has a very much better chance to make a good citizen than a child on an Indian Reservation.

#### THE CONTINGENT FUND.

Out of this must come the attorney's fees and expenses of more than fifty suits arising out of these taxes. Will it be no benefit to these appellees to pay for the trouble they have made and learn the duties of the citizen to the State? And when these fees and expenses are paid there won't be any contingent fund.

But these appellees allege that they are all non-residents of the Territory of Oklahoma. It would appear that he who comes into a court of equity should show that he himself is injured by the action of the party against

whom he complains. If this is true and their claim as to what constitutes benefits is true, then what just ground of complaint have these parties that the levy for school purposes is not spent in the neighborhood of their cattle; that the poor and insane fund is not expended in the neighborhood of their ranches? If the people in these Indian reservations are satisfied, what ground have these non resident to set up defenses for them. An injunction against the collection of taxes should only be granted when the plaintiff brings himself clearly within some of the grounds for equitable relief, and that showing is entirely wanting in this case, we believe. As shown by the decisions above cited, the property on the Maricopa Reservation in Arizona, upon the Shoshone Reservation in Wyoming, upon the reservation in Montana are taxable for all county purposes. What greater benefit can the people upon these reservations derive from the salary fund than the people on the Oklahoma Reservations? Their county officers have no more authority on these reservations than the county officers of Oklahoma have on the reservations in Oklahoma. No treaties in the way in any of them. The laws of congress over all. What more benefit can the people of the reservations in these last mentioned states and territories derive from the county supplies than the people on the Oklahoma reservations? What greater right have the county officials of Arizona, Wyoming, or Montana, to go upon the reservations under their jurisdiction, and dig up the soil and build roads and bridges than the county officials of Kay County, Oklahoma? Would it not be just as true for the people upon the reservation in Montana to say that they derive no benefit from the expenditures of the county moneys

as the appellees to say that they derive no benefit from the taxes in question? What greater right have the county officials to build school houses on, and maintain schools in the Indian reservations of Montana, Arizona, and Wyoming than have the officials of Kay County to do the same on the Osage Reservation?

# I.

In the absence of treaty stipulation, personal property, other than Indian property situated upon the Indian reservations within the boundaries of the States and Territories of the Union, is taxable for State, Territorial, and all county purposes to the same extent, and for the same purposes as personal property situated upon lands the legal and equitable title to which is in white citizens of the particular State or Territory.

We believe that the foregoing proposition is amply sustained by the following authorities:

*Utah & Northern Railway Co. vs. Fisher*, 116 U. S., 28.

*Maricopa & Phoenix R. R. Co. vs. Territory of Arizona*, 156 U. S., 347.

*Truscott Co. Treasurer vs. Hurlbut Land and Cattle Co.*, 19 Circuit Court of Appeals, 374.

*Torrey vs. Baldwin*, 26 Pac. Rep., 908.

*People ex rel. vs. Erie Railway Co.*, 52 Barb., 105.

In *Utah & Northern Railway Co. vs. Fisher* (*supra*), which was a case involving the right to tax railroad



property, Mr. Justice Field, giving the opinion of the Court, said :

“ The only answer of the plaintiff to th is views is that, by the stipulation of the parties and the finding of the Court thereon, it appears that the railway and property which are taxed are situated within the boundaries of, and upon the Reservation. If this be so, it does not follow that the result would be changed. The moment that the road was lawfully constructed it came under the operation of the laws of the Territory.”

In *Truscott vs. Hurlbut Land and Cattle Co. (supra)*, it was held that the cattle of an Illinois corporation, grazed upon an Indian reservation in that State, were taxable for State and all county purposes, the Court in the opinion saying :

“ We are unable to see any good reason why the authority of the State, and its subordinate subdivisions, the counties, may not also include the taxation of all such personal property found within their geographical limits, although upon the reservation in question, provided, as in this case, the Indians are in no way interested in it.”

The record in the Arizona case shows that both the county and territorial taxes were sustained.

## II.

**Where unorganized territory is attached to an organized county for judicial and revenue purposes, the unorganized territory is within the legal boundaries of the organized county.**

“Pro hac vice the boundaries of the latter are enlarged so as to include the former, it is tantamount to this; one part of the statute gives the territorial boundaries, the other provides what shall be for certain purposes the legal boundaries.”

In *Union Pacific Railroad Company vs. Peniston*, 18 Wall., p. 5, it appears that Lincoln County, Nebraska,

levied taxes upon the railroad as follows: Within the *geographical boundaries* of Lincoln County, eight miles; in Cheyenne County (unorganized), 105 miles; in the unorganized country between said counties, sixty-three miles. The Legislature of Nebraska by statute provided (Laws of Nebraska, 1868, p. 249):

"That all the unorganized country lying west of the western boundary of Lincoln County and east of the east line of Cheyenne County, and south of the North Platte River, be and the same is hereby *attached* to the said County of Lincoln for *judicial* and *revenue* purposes, and that the County of Cheyenne, be and the same is hereby attached for judicial and revenue purposes to the said County of Lincoln."

**It will be observed that practically the same question is presented in this case, as the one in the case at bar.**

In the Nebraska case the unorganized country was attached to Lincoln County for judicial and revenue purposes by an Act of the Legislature, while in the case at bar, the unorganized country is attached for judicial purposes by an Act of Congress through the Territorial Supreme Court, and by an Act of the Legislature for revenue purposes.

Mr. Justice STRONG, who delivered the opinion of the Court, says:

"It remains only to notice one other position taken by the complainants. It is, that if the Act of the State under which the tax was laid, be constitutional in its application to their property within Lincoln County, the property outside of Lincoln County is not lawfully taxable by the authorities of that county under the laws of the State. To this we are unable to give our assent. By the Statutes of Nebraska the unorganized territory west of Lincoln County, and the unorganized County of Chey-

enne, are attached to the County of Lincoln for judicial and revenue purposes. The authorities of that County, therefore, were the proper authorities to levy the tax upon the property thus placed under their charge for revenue purposes." (The italics are ours).

In *Philpin v. McCarty*, 24 Kan. 393, it appeared that Sequoyah County, an unorganized county, was attached to the organized county of Ford for judicial purposes. Judge Brewer, (now Mr. Justice Brewer) in giving the opinion of the Court says: (p. 404).

"Again the act combines the division of the State into counties, and the definition of their boundaries, with general provisions for enforcing the laws in such of these counties as are yet unorganized.

"These provisions are that, for certain purposes, the unorganized shall be deemed parts of the organized counties.

"*Pro hac vice* the boundaries of the latter are enlarged so as to include the former. It is tantamount to this: One part of the statute gives the territorial boundaries, the other provides what shall be, for certain purposes, the legal boundaries."

In *Comm'rs. of Marion Co. vs. Comm'rs. of Harvey Co.*, 28 Kan. 181, speaking for the Court with reference to the liability of a detached territory for a county indebtedness incurred previous to the detachment, he says:

"This detached territory stands to Marion County in reference to this indebtedness precisely as though it remained still a part of such county, and we do not understand that the owner of one tract of land in a county can object to the payment of a tax levied upon his land on the ground that the other land owners, etc."

In *Hilliard vs. Griffin*, (Iowa), 33 Northwestern Reporter, 156, it is said:

"ROTHROCK, J.: The County of O'Brien was organized in the month of February, 1860. Prior to that time the territory comprising that County was attached to the

County of Woodbury for revenue, election and judicial purposes. The taxes for the years 1858 and 1859, in the unorganized territory, were assessed and levied by Woodbury County; and by Section 226 of the revision of 1860, it was provided that 'unorganized Counties and other districts now or hereafter annexed to any organized County for judicial, electoral or revenue purposes shall, for these purposes, respectively be deemed to be within the limits of the County to which they are or may be so annexed, and to form a part thereof, unless otherwise provided by law.' So far, then, as the taxes for the years 1858 and 1859 are involved, they were legally levied by Woodbury County. By the statute then in force the taxes were required to be levied and the tax-lists delivered to the County Treasurer by the first day of November of the year in which the levy was made, and taxes became delinquent on the first day of February following. Under the law the taxes in question for the year 1858 were delinquent on the first day of February, 1859, and the tax of 1859 became delinquent on the first day of February, 1860.

"The County of O'Brien was not organized until February, 1860, and all these taxes were then unpaid, past due and delinquent.

"When the levy was made, the land in controversy was, by the express provision of the statute above cited, *in Woodbury County*.

"It was subject to taxation in that County, the same as any other land in the County. In making the estimates of the amount of taxes necessary to be levied for all lawful purposes, this land was included the same as other lands, and the taxes, when levied, became the source from which Woodbury County discharged its obligation to the State for the revenue due to it, and to the various purposes for which taxes may be levied. Whether the right to these taxes could be divested by legislative authority, we need not determine. It appears to us very clear that, without an express act of the Legislature, there was no power in the offices of the new County over the taxes in question. They were past due, delinquent, and collectible in Woodbury County, and belonged to that County. There appears to be no doubt

as to the correctness of this proposition." (Citing authorities).

In *ex parte* Crawford, 11 N. W. Rep., 494, it appears that one Jesse Crawford was convicted of the crime of murder committed in that portion of the unorganized territory of the State attached to the organized County of Holt, and made application for a writ of *habeas corpus* on the ground that the District Court of Holt County had no jurisdiction to try the offense. The writ was denied, the Court in the opinion saying:

"By Section 10, Article 6, of the Constitution, the unorganized territory west of the Sixth Judicial District is made a part thereof. This is supplemented by a legislative provision (Sec. 146, Chap. 18, Comp. Stat. 193), in these words: 'All counties which have not been organized in the manner provided by law, or any unorganized territory in the State, shall be attached to the nearest organized county directly east for election, judicial and revenue purposes,' " etc.

((Now, it happens that directly west of Holt there is no organized county; it is still unorganized territory. Holt, therefore, is the nearest organized county directly east of this territory, and consequently the one to which, by force of the statute just quoted, it is attached "for election, judicial and revenue purposes." As to these three purposes there are no restrictive or qualifying words in the act, but the attachment seems to be complete, and said territory, to all intents, made practically a part of that county.

Indeed, this effect is made still more manifest, if that be possible, by reference to the next section of said act, which provides that "the authorities" (of the county) "to which any unorganized county or territory is

attached, shall exercise control over, and their jurisdiction shall extend to such unorganized county or territory, the same as if it were a part of their own county."

The full extent of such jurisdiction and control can be correctly measured only by a resort to all of the various laws relative to county officers and their duties respecting election, judicial and revenue matters. *W*

Would not this court also refuse a writ to a party convicted of an offense in this attached country by the District Court of Kay County, and would it not hold that by attaching it to Kay County for judicial purposes it became a part of that county, and that the objection that the petitioner was not tried by a jury of the county in which the crime was committed was not tenable?

In *Kemper vs. McClelland*, 19 Ohio 308, it appears that Indian country in the northwest part of that State ceded to the United States was "erected into fourteen separate and distinct counties," but left unorganized, of which Hardin county was one.

By an act passed January 17, 1826, the unorganized County of Hardin was attached to the organized County of Logan "for all the purposes of taxation." The law provided that where the taxable property of a county was less than \$500,000, the levy for county purposes should not exceed five mills, and when over that amount not to exceed three mills. The valuation of each county was less than \$500,000, and the valuation of both exceeded that amount.

The county commissioners of Logan County having levied a tax for county purposes of four and a half mills



upon the property of both counties, a tax deed for land in the unorganized county sold under this levy was cancelled, the Court saying:

"The question is now made upon the several statutes above referred to, whether the limit to the power of the county commissioners applies to counties attached, as well as to counties then acting separately; and we are of the opinion that the limit is the same in both cases, since the two counties make but one district for the purpose of taxation, their taxes being all levied and collected in common, and under the direction of but one board of commissioners. When the power of the commissioners is so limited, a tax of any greater amount is unauthorized and void. In every case where an individual tax is upon trial shown to be greater than the amount authorized, a sale of land for the payment of such tax, will be deemed void, and certainly a general tax must be void, when no power exists for levying it. It only remains to look at the proof and see if the present is such a case. The proceedings of the commissioners show that a tax of  $4\frac{1}{2}$  mills was imposed for *county purposes*; the certificate of the auditor of Logan County shows that the valuation for the two counties for the year 1830 was upwards of \$537,000. That it was over \$500,000 is taken for granted in the argument. The tax, therefore, could not legally exceed three mills on the dollar. As it was in this case  $4\frac{1}{2}$  mills, the tax sale in controversy, and the deed made in pursuance of it, were void."

In *Llano Cattle Co. v. Faught*, (Tex.) 5 S. W. Rep. 494, it appears that the unorganized County of Garza was attached to the organized County of Scurry for judicial purposes. The officers of Scurry County assessed and levied county taxes upon the cattle of plaintiff, a foreign corporation, kept in the unorganized County of Garza. Upon petition for an injunction against the collection of these taxes, the Court in the opinion says:

"No special provision of either organic or statutory law prescribes the place where personal property belong-

ing to a non-resident individual, or corporation, such as the appellant, shall be assessed, and the taxes thereon collected. Such property is therefore left to be governed by the general rule that all property must be taxed in the county where situated. Indeed, it would require special legislation, adopted by a two-thirds vote, to authorize the payment of such taxes at any other place, and then only at the office of the comptroller; and the power to have the assessment done elsewhere than in the county where the property is situated is withheld from the Legislature.

"The requirement that property shall be assessed, and the taxes thereon paid, in the County in which it is situated, cannot be literally complied with in the case of an unorganized county, if by being taxed in the County is meant the assessment and collection by officers who reside and have their offices therein.

"This duty must necessarily be performed by the officers of some other County authorized to discharge these functions in the unorganized County." Injunction refused.

And in syllabus it is accordingly

"*Held*, that the unorganized County being in effect a part of the County to which it is so attached, the collection of taxes on such personality of a non-resident may be enforced by the tax collector of the latter County."

The same Court in the case of *Hardesty vs. Fleming*, 57 Tex., 395, subjected the personality of a non-resident situated in an unorganized County to assessment, and the collection of taxes due upon the same in the County to which it was attached for judicial purposes.

To the same effect is

*Township of Comins vs. Township of Harrisville*, 45 Mich., 442;

*Roscommon vs. Midland*, 39 Mich., 424;

*Board of Comm'rs vs. Northern Pac. R. Co.*, 25 Pac. Rep., 1058.

In international law it is held that the jurisdiction of one sovereign State is projected into the capital and parts of another; as in the case of ambassadors and men of war. True, the statutes of Iowa provide that in the case of attachment for judicial, revenue, or election purposes, the unorganized County is to be deemed within the organized County; this is but a legal conclusion, the result of an abundance of caution. It follows as a matter of law, as in the Ohio case, the Texas case, the Michigan case, the Montana case, the Nebraska case, ~~As~~ there can be no electors on these Reservations, an attachment for election purposes would be useless, and dangerous to good government.

### III.

In the absence of Constitutional prohibition, it is the right of the State or Territorial Legislature to provide for the taxation of all property situated within the legal boundaries of its organized counties, for all county purposes, even though certain individuals in, or certain parts of particular counties, do not receive their share of the benefits resulting from the expenditure of the taxes so collected.

"The basis of apportionment which is fixed upon by the general rule must be applied throughout the district. There can not be two rules of apportionment for the same tax in the same district. If there could there

might be any number, and in effect there would be none at all, and every man might be assessed arbitrarily." Cooley on Taxation, 2 ed. 245.

The Legislature can not vary this rule. Id. 245.

"It is no objection to a tax that the party required to pay it derives no benefit from the particular burden." Id. 3.

"The apparent equity of any particular exaction can not support it as a tax unless it is made in accordance with law; nor, on the other hand, can the seeming injustice of a levy actually authorized by law defeat it, provided it is made under such general rules as the wisdom of the Legislature has determined are needful and proper for the general good." Id. 3.

In *McFerron vs. Alloway*, 14 Bush., 580, it was held that an island in the Ohio river, nearer the Indiana than the Kentucky shore, was taxable for the payment of a public debt incurred in aid of a railroad, though it did not and could not receive any benefit from the railroad. It was sufficient that it was within the taxing district.

In *New York, L. E. & W. R. Co. vs. Commr's of Marion Co.*, 27 N. E. Rep., 548, it is said :

"Counsel for plaintiff in error have criticised the law (the one mile assessment act) with extreme severity, and demonstrate in the case of plaintiff in error and others in like situation it compels a heavy contribution to the costs of an improvement from which they derive very little if any benefit. This, however, is not a test fatal to the power of taxation. If the object is in its nature public, it is not necessary to the validity of a tax levied to accomplish it that persons or property taxed therefor should be directly or pecuniarily benefitted thereby. (Cooley Const. Lim. 587). \* \* \* The taxing district being constitutionally and legally created in the exercise of the general power of taxation, as distinguished from the power of local assessments, it follows that the tax is valid if the constitutional rule of equity has been observed in making the levy."

In *People ex rel. The Pacific Mail Steamship Co. vs. Comm'rs. of Taxes, etc.*, 58 N. Y. 242, it was held that where steamships were registered at the port of New York, and then sent to the Pacific ocean where they were to permanently remain in its trade, and had never returned, and where they were when the assessment and levy complained of was made, they were taxable in the city and county of New York, neither the residence of the owner nor the location of the ships having anything to do with their place of taxation. The Court cited *Hays vs. The Pacific Mail Co.*, 17 How. 596; *Morgan vs. Parkham*, 16 Wal. 471.

We think there can be no doubt but what the owners of the ships, and elevators, and boat-houses, and bridges, and all the vast property upon the oceans and upon, and in, and under the lakes and rivers of this country can prove that neither they, nor their property, receive any benefit from many of the levies made for city county and State government; and that it is upon an element, and in a part of the taxing district (as a river or lake) which can derive no benefit from the taxes, as for instance, roads, sprinkling, street cleaning, street lighting, and where the policeman cannot make his rounds. But the wisdom of the law is greater than that of any man, and time and experience will demonstrate that its "presumptive benefit" is nearer the actual benefit than "competent and material testimony" can prove in any case.

In *Board of Comm'rs. v. Northern Pacific R. Co.* 25 Pac. Rep. 1058, where the Crow Indian reservation was in Custer County but had been attached for "judicial purposes," and judicial purposes only, to Yellowstone

County, it was held that it imposed practically all of the expense of government upon Yellowstone County; yet as the Court could not find any *intention* upon the part of the legislature, to attach it to Yellowstone County for revenue purposes, Custer County could tax it. The Court saying:

"Custer County takes the fruits of the land in the way of taxes and leaves to Yellowstone the labor and expense of maintenance. This injustice is so glaring and absurd that it demands immediate legislative remedy. That remedy is not at the hand of this Court, and we can do nothing but affirm the judgment."

It would appear from this opinion that an attachment for "judicial purposes only" would morally entitle the county to all county taxes; and further in giving all the county taxes to Custer County the Court, and the attorneys for the Northern Pacific overlooked the contention of appellees herein, that the want of benefit released from taxation.

The rule which by the weight of authority applies to cities, to-wit: That they can not extend their limits so as to include farms and property beyond their actual enlargement, as shown by their houses, their streets, and their people, and entirely beyond the range of their protection and facilities, has no application to counties

Cities were not created for the purpose of governing the entire State or putting into effect State laws, but for the local government and protection of populous and compact communities. The territorial extent to which they might be safely intrusted with this form of local government, made necessary by their compact population and peculiar interests, and to which it is possible



for this local government to be beneficial, is readily apparent by the actual limits of the city as shown by its houses and its streets. And when the city goes beyond this it is in the first instance transcending its authority.

But we are satisfied that the authorities are uniform that no such limitation applies to counties, or to the Legislature, in conferring upon all the people of a State or Territory the blessings and protection of county and State government, for it is only through the counties that the State or Territory can supply governmental protection and vigor to all its people, as the heart supplies life and vigor through the arteries to all parts of the body. As well say that some parts of the body might go without blood, and the body be healthy and sound, as to say that some parts of the State or Territory should go without the benefits of county organization and county government, and the State or Territory be politically healthy or sound.

No such manifest limitation of benefits applies to county government. Every person in every nook and corner of the State or Territory, has a vital interest in the maintenance of, and the furnishing of facilities to, courts, and schools, and poor houses, and insane asylums, and all the objects for which county government was established. And this can be done as well by attaching them to an organized county as was done by Congress in attaching this Indian country to Kay County for judicial purposes, as by running the geographical lines of the county around them.

And even as to cities, if the property taxed is within

the city for any of the city's taxable purposes it is there for all.

The Courts have not the facilities for measuring the benefits, or want of benefits of any particular tax—what suit at law or bill in equity would lie; what evidence would be admissable; when must the county be able to show that the benefit has or would attach; how much must the benefit be?

The cost of adjudicating the benefit would be more than the tax, and in addition to the fact that the fundamental law has left the determination of such questions with the Legislative Department, it would result in breaking down the entire fabric of city and county government. Each taxpayer would be entitled to his week in court to show the benefit or want of benefit to his farm. That measured by benefits he was in some other county or out of the taxpaying world entirely. It was for the purpose of avoiding such questions as these that county lines were established. Even as applied to cities, if one levy is good all are good.

In *State vs. Brown*. (N. J.) Atl. Rep., 772, the Court says:

"Inequality is the rule arising out of the inevitable variations of personal environment. Hundreds are assessed in a city for the expense of electric lights, who have to content themselves with gas, or nothing; for sewers, when no sewer runs within a mile of their property; for public parks which are located on the opposite side of the city and are practically unreachable for the purposes of recreation; and for police, when such an officer is rarely visible. Many of the levies for the support of these and similar features of municipal government are as inequitable as the levy of urban taxes upon rural property. It has never been successfully urged that because of the inequality of return the tax was in-

equitable. The Courts which have enjoined the collection of taxes upon agricultural land assessed for municipal purposes have not intimated that they would entertain jurisdiction of cases of taxation where there was some but not an adequate benefit. This was a ground set up in the case of *State vs. Collector*, 39 N. J. Law, 75, against an assessment for taxes made upon property situated within the limits of a district under control of a municipal corporation known as The Long Branch Police, Sanitary & Improvement Commission. It was insisted that the prosecutor in that case was not liable to be taxed for police, fire department, or lighting streets, because his property was some distance from street lights, police patrol and the depository of the fire apparatus, and, therefore, he could have no benefit from them. It was held that these facts presented no ground upon which the taxpayer could be relieved from his assessment."

In *St. Louis Bridge Co. vs. City of East St. Louis et al.*, 12 N. E. Rep., 723, it is said :

"SHOPE, J.: This was a bill for injunction to restrain the collection of the city taxes levied and assessed by the corporate authorities of the city of East St. Louis for the year 1885, upon all that part of the bridge across the Mississippi, and connecting the cities of East St. Louis and St. Louis, between the west line of Front street, in the city of East St. Louis, and the middle of the Mississippi. Plaintiff in error, a corporation existing under the laws of the State of Missouri, became the owner of the bridge and its approaches in 1879; and as such owner exhibited this bill in the Circuit Court of St. Clair county, where, on demurrer being interposed, the bill was dismissed, and the record is brought to this court by writ of error. It appears from the bill that the bridge and approaches are within the city limits of East St. Louis, which extend westward to the boundary line of the State, to-wit: the middle of the Mississippi river; but that a great part, and the most valuable part, of said bridge structure, is west of the east bank of the Mississippi river, and west of the west line of Front street, in the city of East St. Louis, and is in and over the Missis-

Mississippi river, and upon territory not in any way improved or even improvable on the part of the said city of East St. Louis. \* \* \* That that part of the bridge eastward of the western boundary of the State and city, in and over the Mississippi river, and on land covered by that river, which, for that reason, could never be used by the city for any purposes of improvement, is three times more valuable than that part of the bridge structure within the improved and improvable part of the city. \* \* \* That in the preceding ten years plaintiff in error has paid city taxes upon such bridge structure to the amount of \$125,000; that it has not, during that time, derived any protection for any part of the bridge structure from the municipal corporation, nor has a dollar of the heavy taxes it has paid to the city been by the city spent for the use or protection of the bridge; that plaintiff in error has, at heavy expenses, lighted the bridge and approaches, policed it with its own police force; built and maintained its own water works, laying pipes, erecting water and fire plugs, not only on its own structure, but under and along the streets of the city; maintained its own apparatus for extinguishing fires, the city having no fire department; sprinkled the bridge and approaches, cleaned its roadway and the city's streets and dykes leading to the bridge, to accommodate the team bridge traffic; employed physicians and provided hospital accommodations for its injured employees. \* \* \* That as to all that part of the bridge beyond the western line of Front street, and which is situated in and over the Mississippi river, the city tax was illegally and unconstitutionally levied."

The Court, after showing among other things that the fact that this bridge is in a part of the taxing district covered with water; that the fact that it is not and cannot be laid out into streets, or improved, or any part of the city's taxes expended therein; that none of these things invalidate the taxes that "the uniformity required by the constitution would be flagrantly violated if the property of plaintiff in error within the jurisdiction of

East St. Louis was not required to bear the same burden imposed upon other property within the same jurisdiction, says :

"Assuming that in the last ten years plaintiff in error paid taxes to the city aggregating \$125,000, no part of which was expended in protecting the property of plaintiff in error taxed, is that a sufficient reason why this tax should be enjoined? Can relief against corporate taxation be predicated upon so illi logical a position? Manifestly not. \* \* \* It is no valid objection to a tax levied for corporate purposes upon property subject to taxation that the property owner can not see that his property is benefited or protected by the expenditure of the fund, or that it does not in fact derive any appreciable benefit therefrom. \* \* \* So here, while this bridge remains within the corporate limits of East St. Louis, it will be subject to taxation for corporate purposes uniformly with other property within the same jurisdiction; and this will be so although it may not be appreciably benefited by the particular municipal purpose or improvement for which the tax may be expended."

It was certainly the intention of Congress in its grant of legislative power in the Organic Act, as it has been adjudged to be in the other Territories under acts substantially the same, to confer this power of putting into force throughout every nook and corner of the Territory the benefits of county government, and the attempts of the Courts to interfere with the authority of the legislative department in this regard presents constitutional objections which we believe are absolutely unsurmountable.

Once the property is within the legal boundaries of the county the law presumes benefit, and presumptive, not actual benefit to the tax-payer, is the foundation for the levy of taxes as distinguished from assessments for

local improvements, and the tax-payer will not be permitted to show that this presumption is not true. His appeal is to the legislature which enacted the law, and where alone it properly belongs. As was said in *Kelley vs. The City of Pittsburg*, 104 U.S. 658, speaking of the want of benefit from particular levies:

"Clearly these are matters of detail within the legislative discretion, and therefore of power in the law-making body within whose jurisdiction the parties live. This Court cannot say in such cases, however great the hardships or unequal the burden, that the tax collected for such purposes is taking the property of the tax-payers without due process of law."

The petition in this case alleges, that this attached territory "is comprised wholly of lands owned, paid for and occupied by said Indian tribes, and consists principally of wild, unimproved and unallotted lands, which said wild, unimproved and unallotted lands which were not needed for allotment have been leased to these plaintiffs for grazing purposes. \* \* \* \*

"That these plaintiffs, during the year 1895 and during the month of April of said year, at the commencement of the grazing season drove, transported and shipped to the ranges and pastures in said Indian Reservations, large herds and quantities of cattle, which were taken on to said Reservations in pursuance of and by virtue and authority of said leases with the said Indian tribes, together with other articles of personal property necessary and needful in herding, grazing and caring for said cattle, and that the said plaintiffs did not at any time have any other personal property during the year 1895 upon said Indian Reservations." (Record, p. 9.)



If the Assessor went to these Reservations on the first of February, (the day on which the assessment begins in the organized counties) he would find comparatively little property; but after the grazing season begins, in April, they are full of property.

This, with the practice of purchasing cattle after February 1st and shipping them into the Territory, and upon these Reservations, the difficulty and expense of making assessments in this wild country in the winter time, and other reasons which might be mentioned, no doubt compelled the legislature to fix the taxable status of persons and property upon these Reservations as of May 1st, instead of February the 1st, as in the organized counties. And this difference in circumstances, we believe the Court will find, amply justified and made just and reasonable, the Act of the Legislature in this regard. And it was in the province of the Legislature to pass upon all questions of fact involved in the passage of this Act. (Cooley on Taxation, 2d Ed., p. 150.)

Nor is it necessary that all property of a tax-payer, or all the property in a county, should be assessed at the same minute of time or on the same day. This would be impossible. The laws of the States generally give the assessor from two to six months in which to make the assessment, and surely that part of the county which is assessed last cannot avoid paying its taxes on the ground that the assessor called in that neighborhood two months after he assessed some other part of the county. So that the various constitutional and State statutes requiring uniformity in taxation cannot be held, or intended to apply to the date at which the listing and ap-

praisement is made. Cooley on Constitutional Limitations 5 Ed., side page 513, says:

"It will be apparent from what has already been said that it is not essential to the validity of taxation that it be levied according to rules of abstract justice. It is only essential that the legislature keeps within its proper sphere of action, and not impose burdens under the name of taxation which are not taxes in fact; and its decision must be final and conclusive. Absolute equality and strict just are unattainable in tax proceedings. The legislature must be left to decide for itself how nearly it is possible to approximate so desirable a result. It must happen under any tax law that some property will be taxed twice, while other property will escape taxation altogether. Instances will also occur where persons will be taxed as owners of property which has ceased to exist. The system in vogue for taking valuations of property fixes upon a certain time for that purpose, and a party becomes liable to be taxed upon what he possesses at the time the valuing officer calls upon him. Yet changes of property from person to person are occurring while the valuation is going on, and the same parcel of property is found by the assessor in the hands of two different persons, and is twice assessed while another parcel for similar reasons is not assessed at all.

Then the man who owns property when the assessment is taken may have been deprived of it by accident or other misfortune before the tax becomes payable; but the tax is nevertheless a charge against him. And when the valuation is only made once in a series of years the occasional hardships and inequalities in consequence of relative changes in the value of property from various causes become sometimes very glaring. Nevertheless, no question of constitutional law is involved in these cases, and the legislative control is complete."

These people are not injured by this difference in the date of the assessment.

Take a man with, say one hundred head of cattle in Kay County proper on February 1st, the date of the assess-

ment there, and one of these appellees with one hundred head of cattle in this attached country. When the assessor called on the man in Kay County on February 1st, he assessed not only his hundred head of cattle but he assessed to him all the hay, corn, oats, and fodder which he had on hand to feed his cattle until "the commencement of the grazing season." Not only that, he assessed all the money he had on hand to pay for his hands to take care of the cattle, and all the money he had to take care of himself and family during that time. When he called on the man in this attached country on May 1st, he found that his hundred head of cattle had eaten up all the hay, and corn, and oats, and fodder necessary to their support during February, March, and April, and that the man had spent all the money necessary to pay hands, and to support himself and family during said months. It amounts simply to this: the feed and money which the assessor would have found and assessed on February 1st, reappears on May 1st, in the form of beef, and is assessed as such, and hence the allegation in plaintiff's petition. The Court can readily see the discrimination is more apparent than real.

A uniform valuation is not necessary if a just valuation is obtained. *Louisville, etc., R. R. Co v. State*, 25 Ind. 177; Am. & Eng. Ency. of Law, vol. 25, p. 56. But under the authorities if it did make a difference it would not invalidate the tax.

Bearing in mind the familiar principle in the law of taxation that, the whole State is but one taxing district for State purposes, the county but one taxing district for county purposes, etc., (Cooley on Taxation, p. 244), it is provided

by law in the State of New York that assessments of the real and personal property in the City and County of New York for State, city and county purposes shall be made between the first Tuesday of September and the second Monday of January; and the taxable status of persons and property therein determined as of the second Monday in January. In the other counties outside of the City and County of New York the statute provides that the assessments shall be made during the months of May and June, and the taxable status of persons and property fixed as of the first day of July; and this wide difference in time in the making of assessments for State taxes—in the same taxing district—is held legal. *The People ex rel. vs. The Com's of Taxes, etc.*, 91 N. Y., 593, and cases cited therein.

*Assn. for Colored Orphans vs. Mayor, etc.*, 104, N. Y., 581.

*People vs. Spring Valley etc.*, 92 N. Y., 383.

In Missouri the law provided that real property should be assessed every two years in all counties outside of St. Louis, and that all property in the City of St. Louis, and that portion of the State embraced within its limits, should be assessed every year for State and municipal taxes. In *State vs. Lindell Hotel Co.*, 9 Mo. Appeals, 450, This difference in the time of assessments was held legal, although in this case it made a great difference in the amount of taxes.

The Legislature of Wisconsin passed an Act fixing the first day of April as the date when saw logs belonging to non-residents of the State should be assessed for taxation, while the time fixed in the general revenue law

for assessing the saw logs of residents was fixed on May 1st.

Justice Bunn, in passing upon and sustaining the legality of the statute, said :

"It is claimed, first, that this law violates the principal of uniformity in providing for an assessment of the logs of a non-resident at a different time than that provided in the case of residents; second, that for the same reason it discriminates unjustly against non-residents. But I am of the opinion that the case does not come within either of these principals.

"The Constitution provides that the rule of taxation shall be uniform. This would be the law if there were no Constitutional provisions on the subject. It is of the very nature of a tax that it should be assessed according to some uniform rule; otherwise it would be confiscation, and not taxation. But this does not mean that the time and method of assessment shall be identical, but only that after the Legislature has declared what classes of property shall be subject to taxation, the tax itself shall be levied upon such property or the owner thereof according to a uniform rate of valuation. It is not denied that this has not been done in this case. Indeed, so far from setting up one standard of valuation for one class of persons and another for another class, possessing the same kind of property, the purpose of the law would seem to be to bring about that substantial equality in taxation which the common law, as well as the Constitution, requires. The Legislature was aware that the logs of non-residents, as well as resident owners, were liable to be floated out of the State in the month of April, etc."

*Nelson Lumber Co. vs. Town of Loraine*, 22 Fed. Rep. 54.

This Court has held that the assessment of merchants' stocks by the monthly average of the amount on hand is legal, and commend the method, though a different rule applied as to the rest of the property in the State.

*Shotwell vs. Moore*, 129 U. S., 590.

That a different time and method of assessing railroad property from the time and method of assessing other property in the State is legal. "Kentucky R. R. Tax Cases," 115 U. S., 321. Most of the States provide by statute, as does Oklahoma, for a different date in assessing real estate from that of assessing personal property, even where the State Constitution provides for uniformity in taxation; and this, under the authority, is held legal. *Wisconsin Cent. R. Co. vs. Lincoln Co.*, 15 N. W., 121.

In *St. Louis I. M. & S. Ry. Co., vs. Worthen*, 13 S. W. Rep., 254, it appeared that railroad property was classed as real estate for the purposes of taxation, and the law provided that real estate should be assessed every two years; a special provision of the statute provided that railroad property should be assessed every year. This discrimination was held not to avoid the tax on railroads nor to conflict with the Constitution of the State providing that "the value of property assessed for taxation shall be ascertained in such manner as the General Assembly shall direct, but shall be equal and uniform throughout the State."

The following decisions clearly establish the right of the State or Territorial Legislature to provide for different dates in the assessment, and that the rule of uniformity, as said by Judge Bunn, (*supra*) has no application to the date of the assessment.

*Wisconsin Cent. R. Co. vs. Lincoln Co.*, 15 N. W. Rep., 121.

*Comm'rs etc., vs. Nelson*, 19 Kan., 234.

*C. C. C. &c. Ry. Co. vs.*, 18 L. R. A., 740.



*People vs. Henderson*, 21 Pac. Rep., 144.

The claim of plaintiffs that the Act fails to provide for the taxation of real estate on the Reservations, to-wit: railroads, is untenable.

The grant to the railway took it out of the Reservation. *Maricopa &c. Ry. Co. vs. Arizona*, 156 U. S., 347. And the Statutes of Oklahoma (Laws 1895, Sec. 3, Art. 4, Chap. 43,) provides that railroad property is personal property for the purposes of taxation.

The petition of plaintiffs states that most of their property was brought in after March 1st, and under the circumstances, it would be taxable under Art 5, Chap. 43, Laws 1895, (Appendix page<sup>64</sup>) even though the assessment was illegal.

It is not necessary that the people on these Indian reservations should have the right to vote for the election of either the county or Territorial officers before they can be taxed.

These reservations are set apart as "a permanent home" for the Indians under treaty stipulation, and this provision is incompatible with the idea that it can become the permanent home of white citizens of the United States. This court will take judicial notice of the fact that no one can loose his domicile or residence elsewhere and acquire one upon these reservations. Sec. 2118, Revised Statutes U. S., provides: "Every person who makes a settlement on any lands belonging, secured or granted by treaty with the United States to any Indian tribe \* \* \* is liable to a penalty of one thousand dollars," and every person other than an Indian who

goes upon them, can only do so by permission of the United States authorities for a particular temporary purpose; and that for a limited time.

As was well said in *State ex rel. Dollard vs. Board of County Commissioners*, 46 N. W. Rep., 1127:

"The entire Indian reservation of which these counties formed a part was a segregated territory, in which no person could acquire any political rights, nor had the legislature power to confer any."

Even if they were not Indian reservations still the legislature would have the right to attach them to Kay County, and levy and collect taxes for all county purposes, upon all the property other than Indian found therein, and yet prohibit the inhabitants from voting for any or all the county officials. The Kansas Statute, (*supra*), Sec. 1610, Gen. Stat. 1889, after providing for the attaching of unorganized counties to organized counties for judicial purposes, provides:

"That in no case \* \* \* shall its (the unorganized counties) electors have the right to vote on the election of county officers or representatives within or for such organized county."

And yet the organized county to which an unorganized county is attached has the right to levy all county taxes under this statute, on all the property in the unorganized county for the same purposes, and to the same extent as though the unorganized county was within the geographical boundaries of the organized county. *Ayers, et al. vs. The Board of Commissioners, etc.* 37 Kan. 240. And this act is constitutional. *Philpin vs. McCarthy*, 24 Kan. 393.

In *Loughborough vs. Blake*, 5 Wheaton, 317, this Court held that Congress could levy direct taxes upon the

people of the District of Columbia, and the Territories, although they had no representative in that body. It was not taxation without representation. Chief Justice MARSHALL pointing out what that expression meant, among other things showing that a Territory is in a state of political infancy and advancing to its destined position of Statehood. This unorganized territory is in a state of infancy. It can not take care of itself, and a glance at the conditions will show that good government demands that the elective franchise, at least for the present, be withheld.

The Governor, Judges and all the Territorial officials are appointed by the President, yet the people of Kay County have to pay Territorial taxes. When the people rushed into Kay County on September 16, 1893, they found a full corps of county officials appointed by the Territorial Governor, and these county officials levied and collected county taxes for all county purposes from them. (Cooley on Taxation, page 59.)

At the time of the Revolution not to exceed one-tenth of the population in England had a right to vote, and neither the inhabitants in, or the cities of Leeds, Halifax, Birmingham, nor Liverpool had a vote for, or a member of Parliament, and yet they were taxed like all the rest of the people. And this was not taxation without representation. "The Literature of the American Revolution," by Prof. Tyler, cited in "The Literary Digest" of July 3rd, 1897, page 281.

The statute under consideration is not open to the objection that it is local or special legislation. It applies to all unorganized country, districts and reservations

in the Territory, present and prospective. It applies to all of a class, and the circumstances, and situation, and conditions of the unorganized country, districts and reservations are so marked, and so peculiar, as to make them a class unto themselves, and the rule of uniformity itself not only justifies, but imperatively demands, particular statutory provisions.

In *Edge vs. Robertson*, 112 U. S., 580, it is held that an Act of Congress which imposes upon the owners of vessels who shall bring passengers from a foreign port into a port of the United States, a duty of fifty cents for each passenger not a citizen of this country, is not void as against the Constitutional rule of uniformity, because it does not apply to passengers brought in by way of Canada or the Mexican border; the evil only existing on the coast where the subject of it is found.

In *Home Ins. Co. vs. New York*, 134 U. S., 594, 606, 607, speaking of tax laws, the Court speaking through Mr. Justice FIELD, says:

"Indeed, the greater part of all legislation is special, either in the extent to which it operates, or the objects sought to be obtained by it. And when such legislation applies to artificial bodies, it is not open to objection if all such bodies are treated alike under similar circumstances and conditions, in respect to the privileges conferred upon them and the liabilities to which they are subjected. Under the Statutes of New York all corporations, joint stock companies, and associations of the same kind are subjected to the same tax. There is the same rule applicable to all under the same conditions in determining the rate of taxation. There is no discrimination in favor of one against another of the same class."

And this is true even where the State Constitution requires uniformity.

*Pacific Express Co. vs. Seibert*, 142 U. S., 339; "Kentucky Railroad Tax Cases," 115 U. S., 321.

In addition to what is so ably said in the opinion by Judge Tarsney (Record p. 41), and the authorities there cited, we would respectfully cite: *Rutgers vs. New Brunswick*, 22 N. J. Law, 53; Sutherland Stat. Con. S., 121 and 124; *Wheeler vs. Philadelphia*, 77 Pa. St., 336; *McAunich vs. Railroad Co.*, 20 Iowa, 338.

Appellants therefore pray that the decree be reversed, the injunction dissolved with directions to dismiss the petition; for costs, and for such other and further relief as may be just, equitable, and proper.

J. F. KING,

*Counsel for Appellants.*

## APPENDIX TO BRIEF.

### Statutes of Oklahoma Concerning Taxation.

SESSION LAWS OF OKLAHOMA, 1895.

#### CHAPTER 43.

#### ARTICLE 6.—PROPERTY TAXABLE IN TERRITORY ATTACHED FOR JUDICIAL PURPOSES.

AN ACT to amend Section 13, Article 2, of Chapter 70, of Oklahoma Statutes relating to revenue.

*Be it enacted, by the Legislative Assembly of the Territory of Oklahoma:*

SECTION 1. That section 13, article 2, chapter 70, of the Oklahoma Statutes relating to revenue, be and the same is hereby amended so as to read as follows:

SECTION 13. That when any cattle are kept or grazed, or any other personal property is situated in any unorganized county, district or reservation of this Territory, then such property shall be subject to taxation in the organized county to which said county, district or reservation is attached for judicial purposes, and the board of county commissioners of the organized county or counties to which such unorganized county, district or reservation is attached shall appoint a special assessor each year whose duty it shall be to assess such property thus situated or kept; such special assessor shall have all the powers and be required to perform all the duties of a township assessor, and shall give a similar bond and take the same oath



as required of such township assessor, and receive the same fees as a township assessor, and the officer whose duty it shall be to collect the taxes in the organized County to which such country, district or Reservation is attached shall collect the taxes and is vested with all the powers which he may exercise in the organized County, and his official bond shall cover such taxes. The assessor herein provided for shall begin and perform his duties between the first day of April and the twenty-fifth day of May, in each year, and complete his duties and return his tax lists on or before June first; and said property herein authorized to be assessed shall be valued as of May the first in each year. That in case said property at any time has by oversight or negligence or for any other cause been irregularly, illegally or defectively assessed, it shall be lawful for the special assessor to assess or re-assess the same as the case may be and when done the same shall be valid for all intents and purposes, and in performing his duties under this section he may make out his assessment roll or lists from the best evidence attainable. Any person who feels aggrieved by his assessment in any such country, district or reservation, may appear before the board of county commissioners for the organized county to which such country, district or Reservation is attached for judicial purposes at their session commencing on the first Monday in June, and the board of county commissioners shall have power to correct any and all errors and equalize individual assessments; *Provided*, that the assessed valuation of such attached territory shall in no case be taken as a basis for the creation of a bonded indebtedness of the county to

which it is attached or in estimating or limiting the same.

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SESSION LAWS OF 1895, CHAPTER 43, ARTICLE 5.

SECTION 1. When any personal property shall be located in any county of this Territory after the first day of March of any year, which shall acquire an actual situs therein before the first day of September, such property is taxable therein for that year, and shall be assessed and placed on the tax roll and the tax collected as provided by this Act.

SEC. 2. Whenever any live stock shall be located in this Territory for the purpose of grazing, it shall be deemed to have acquired an actual situs therein as contemplated by this Act.

SEC. 3. When any person, association or corporation shall settle or organize in any county in this Territory and bring personal property therein after the first day of March, and prior to the first day of September in any year, it shall be the duty of the assessors to list and return such property for taxation that year unless the owner thereof shall show to the assessor, under oath, that the same property has been listed for taxation on that year in some other State, or county in this Territory, etc.



**Supreme Court of the United States**

- A. H. ...  
B. ...  
C. ...  
D. ...  
E. ...

...

Brief on behalf of the ...

**HARPER S. CUNNINGHAM**

Attorney General of the ...

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IN THE  
Supreme Court of the United States  
October Term, 1897.

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*A. M. THOMAS, J. B. HART and H. B. OWENS,  
as the Board of County Commissioners of Kay  
County, Oklahoma Territory, et al.,*

*Appellants.*

**No. 287.**

*VS.*

*D. P. GAY and A. S. REED, Partners as Gay  
& Reed, et al.,*

*Appellees.*

*D. P. GAY and A. S. REED, Partners as Gay  
& Reed, et al.*

*Appellants.*

*VS.*

*A. M. THOMAS, J. B. HART and H. B. OWENS,  
as the Board of County Commissioners of Kay  
County, Oklahoma Territory, et al.,*

*Appellees.*

**No. 439.**

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*Appeals from the Supreme Court of the Territory of  
Oklahoma.*

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*Brief on Behalf of the Territory of Oklahoma.*

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STATEMENT OF THE CASE.

The statement of facts is fully set forth heretofore in the brief of Mr. King, in case No. 287, and the brief of counsel for the plaintiffs below and cross-appellants in case No. 439. The interest of the Territory of Oklahoma in these cases is in maintaining



the judgment of the court below, sustaining the validity of the territorial taxes, and on behalf of the Territory, this brief will be directed solely to that point.

### ARGUMENT.

Counsel for the plaintiffs below and cross-appellants in the first and second propositions discussed, maintain the law to be that the Territory of Oklahoma has no power or authority to enact any law which would levy a tax upon property found or being in the Indian reservation described in the record, and in the third to the seventh propositions discussed by them they offer technical objections to the enforcement of the law requiring them to bear their fair share of the expenses.

The power of the Territory under Sections 4 and 6 of the Organic Act, to enact laws which extend over these reservations is fully supported by the authorities cited and discussed on page 33 of the record, to-wit:

*Utah & Northern Railway Co. vs. Fisher*, 116 U. S. 28.

*Langford vs Monteith*, 102 U. S. 145.

*Phoenix & Maricopa R. R. Co. vs. Arizona Territory*,  
26 Pac. Rep. 310.

*Maricopa & Phoenix R. R. Co. vs. Arizona Territory*,  
156 U. S., 347.

*Torrey vs. Baldwin*, 26 Pac. Rep. 908.

*Gon-shay-ee*, Petitioner, 130 U. S. 343.

*Ex parte Crow Dog*, 109 U. S. 556-560.

*United States vs. Kagma*, 118 U. S. 375.

*United States vs. Pridgeon*, 153 U. S. 48.

In addition to the above authorities we call

special attention to a late and exhaustive case decided by the Circuit Court of Appeals for the Ninth Circuit, *Truscott, County Treasurer, vs. Hurlbut Land & Cattle Co.* 73 Fed. Rep. pg. 60; s. c. 19 C. C. Appeals; pg. 374.

In the last mentioned case the court says:

"The cattle upon which the taxes in question were levied were grazing upon the reservation under lease from the Crow Indians, the sanction to which by the United States did no violence by the provisions of the treaty between the government and them. They were within the geographical limits of the state of Montana and of the county of Custer of that state, and were the property, not of the Indians, but of a corporation of the state of Illinois, and were confessedly liable to the taxes levied unless they were without the jurisdiction of the state of Montana. That they were not we consider very clear."

In *United States vs. Pridgeon, supra*, the court holds that the laws of Nebraska put in force in the Territory of Oklahoma by the Organic Act, applied to and were in force in the Indian reservations involved in this action, and quote with approval the opinion of the Supreme Court of the Territory of Oklahoma in *Ex Parte Larkin*, 1 Oklahoma, 53, 57, which is as follows:

"It was intended by Congress that the laws of Nebraska should constitute the Territorial Code, as distinguished from the Laws of the United States in force in the Territory of Oklahoma, and that they sustained the same relation to courts and to the people of the Territory and to the Legislative Assembly as a code of laws enacted by the Legislative Assembly."

Under the Organic Act of Oklahoma Territory, immediately upon the adjournment of the first session of the Legislature, December 24, 1890, the laws enacted by said Legislature and by all subsequent legislatures, became operative to the same extent as did the laws of Nebraska put in force by the Organic Act. There being no treaty stipulations between the Indian tribes and the government excluding the reservations involved in this action from becoming a part of the Territory of Oklahoma, by the Organic Act said reservations became a part of the Territory, which in principle has been decided by this Court in 116 U. S. 102 U. S.; 153 U. S.; 26 Pac. Rep. and 73, Fed. Rep. s. c. 19 C. C. Appeals *supra*.

In *Maricopa Co. vs. Territory of Arizona*, 26 Pac. Rep. 310, the court says:

"In the absence of treaty or other express exclusion, the different Indian reservations become a part of the Territory where situated and subject to the territorial legislative jurisdiction, subject, however, to the power of the general government to make regulations respecting Indians, etc."

This case was appealed to this Court and was affirmed, 150 U. S., pg. 349.

Plaintiffs below and cross-appellants assert that taxation of cattle kept and grazed on Indian reservations, as in this case, is a direct tax upon the right of the Indian tribes, and in support of their position cite the income tax case. This case, we insist, is not in point. On the other hand, the Circuit Court of

Appeals, in *Truscott vs. Hurlbut Land & Cattle Co. supra*, a case identical with the one at bar, says:

"The cattle here sought to be taxed, as has been said, were upon the reservations under lease from the Indians, sanctioned by Act of Congress, and it is impossible to perceive that any of their just rights under the treaty and agreements with them on the part of the United States can be impaired by subjecting complainant's cattle to taxation. In reserving lands for the exclusive and undisturbed use of these Indians, and for others who, with their consent and with that of the United States, shall occupy them, it was not the intention of Congress to establish an asylum into which persons, other than the Indians, whether natural or artificial, can take their property, and hold it exempt from its just proportion of the taxation necessary for the support of the government which gives it protection. For the protection of the complainant's cattle in all matters unconnected with the Indians the authority of the state of Montana is available."

Just so are the laws of the Territory of Oklahoma available for protection of the plaintiff's rights in the Territory of Oklahoma, and so, also, should they be required to contribute to the maintenance of its government.

The third contention of cross-appellants is that the Act of the Legislature authorizing the taxation is unconstitutional and void, in that it confers upon the Supreme Court of the Territory the right to fix taxing districts, which is a legislative function.

In answer to this proposition we submit that the

decision of the Supreme Court of the Territory in this case is not only conclusive, but exhaustive in the argument upon this subject, in that the Supreme Court of the Territory has never attempted to fix any taxing districts; that the court under the powers expressly invested in it by the Organic Act of the Territory, in 1894, attached these reservations and unorganized country to Kay County for judicial purposes, and not for the purposes of taxation; that the taxing districts in which these taxes were imposed and levied were created and fixed, not by the Supreme Court, but by the Legislature in the Act of 1895, the language of the Act being:

"That when any cattle are kept or grazed, or any other personal property is situated in any unorganized country, district or reservation in this Territory, that such property shall be subject to taxation in the organized county to which said country, district or reservation *is* attached for judicial purposes."

It was by this Act that a taxing district was created, and not by the order of the Court.

We submit that the mere fact that the boundaries of the taxing districts are co-incident with the boundaries of the territory attached to Kay county for judicial purposes by the Supreme Court, would not justify the Court in holding that the Act was void.

We admit that the fixing of the taxing districts is a legislative function, but strenuously deny that the Legislature empowered the Supreme Court of the Territory to fix such districts. The Organic Act author-

izes the Supreme Court to fix the judicial districts, which it did, and the Legislature merely denominated the unorganized territory in the judicial district of which Kay County was a part as a taxing district to Kay County, and there is no difference in the description of the taxing unorganized district of Kay County than had the Legislature described it by metes and bounds just as the Supreme Court described it.

The legislative enactment, as above quoted, was that the unorganized country, district or reservation which was attached to Kay County, as well as any other unorganized country, districts or reservations, attached to other counties for judicial purposes, should constitute taxing districts, and, while it is true that the Supreme Court might change the judicial districts, the taxing districts, as created by the Act of the Legislature of 1895 would not be changed and can only be changed by further legislative enactment.

In *Ferris vs. Vennier*, 42 N. W. Rep. 34, a case similar in all particulars to the one at bar, except that the attached territory was not an Indian reservation, but was unorganized territory, the Supreme Court of Dakota Territory held that the levy for territorial purposes was a valid tax.

Unless cross appellants have "clearly and palpably" shown that the law complained of violates the Organic Act and the laws of the United States, they must fail in their contention. This they have not done.

"That the right to tax rests upon necessity, is in-



herent in every government and with us is in vested the legislative department, which possesses plenary power over the subject except so far as may be restricted by the constitution of the states or the United States, and it rests with those who allege the unconstitutionality of an act of the legislature to show clearly and palpably wherein it violates the constitution are fundamental principles, which can not be controverted."

*Porter et al vs. R. I. & St. L. R. R. Co.*, 76 Illinois, 561.

As to the fifth contention, in addition to the exhaustive argument and the citation of authorities in the decision under consideration in this cause, we contend that the act of 1895 does relate to and cover all taxable and personal property in all unorganized country and on Indian reservations; that it is not special legislation within the meaning and prohibition of the Act of Congress of July 30, 1886. That the Act of 1895 provides as follows, page 232, Session Laws:

"That when any cattle are kept or grazed, or any other personal property is situated in any unorganized country, district or reservation of this Territory, then such property shall be subject to taxation in the organized county to which said district or reservation is attached for judicial purposes."

This embraces all classes of personalty. The language is so plain that it is not a question of construction, and following this provision the Act provides the manner of assessment, levying and equalizing the taxes assessed and levied.

As to this contention that it violates Section 6 of the Organic Act creating the Territory of Oklahoma by assessing these reservations on a different day from the assessment of like property in the County of Kay, it is based on misconception and misconstruction of said Act.

The provision of the Organic Act is that no "unequal discrimination shall be made in taxing different kinds of property, but all property subject to taxation shall be taxed in proportion to its value."

The sole fact on which appellants' counsel base this contention is that their property was valued as of May first; while similar property in the organized counties was valued as of February first. There is nothing in the letter or spirit of the Organic Act prohibiting this; only two discriminations are inhibited, one relates to the different kinds of property and the other requires that all property be taxed according to its value.

The question is not a new one, but has been frequently raised and uniformly settled one way until it is not now an open question. A leading case on the subject is that of *Land, Log and Lumber Co. vs. Brown*, 40 N. W. Rep. 882, also *Nelson Lumber Co. vs. Town of Loraine*, 21 Fed. Rep. page 54. This case involved the construction of a clause of the Wisconsin constitution similar to Section 6 of Organic Act of Oklahoma.

Under the Oklahoma Revenue Laws, real estate is valued as of January 1. Fixing the time of valuation is a matter of legislative discretion if there is no ex-

press provision on the subject in the Organic Act limiting it.

Judge Cooley in his work on taxation, page 149, says:

"When the nature of the case does not conclusively fix it, the power to determine what shall be the taxing district for any particular tax is purely a legislative power, and it is not to be interfered with except as it may be limited or restrained by constitutional provisions. The judicial tribunals can not interfere with the legislative discretion, however erroneous it may be."

The principle enunciated by Judge Cooley will apply to all other details not within express limitations; the fixing of districts and the time for assessing value in the attached country is a matter of legislative discretion. The only limitation being that all property shall be assessed according to its value.

This Court will take judicial cognizance as a matter of law that there is no taxable real estate in these Indian reservations on which a tax could be legally levied.

In the case of *Daily Leader vs. Cameron*, 3 Oklahoma Rep. 677, legislation as prohibited is fully discussed and passed upon. The case fully sustains our contention that the Act under consideration does not come within the prohibition of the Act of Congress.

*Francis vs. A. T. & S. F. Ry.*, 19 Kansas. 303.

*Sutherland on Statutory Construction*, Sec. 124.

*Wheeler vs. Philadelphia*, 77 Pa. State Rep. 366.

*McAunich vs. R. R. Co.*, 20 Iowa, 338.

*State vs. Cooley*, (Minn.) 52 N. W. Rep. 150.

*Sutherland*, Sec. 129.

*Rogers vs. ———*, 22 New Jersey Law, 53.

While the Act in question does not apply to all personal property within the *Territory* it does apply to all of a class within like circumstance, to-wit: to cattle kept, or any other kind of personal property, except that of Indians, *situated in any unorganized country, district or reservation*, and it seems is general in its application and can not be properly said to be local or special.

In the Wisconsin case *supra* Justice Bunn in passing upon and sustaining the legality of a similar statute to the Territorial Act of 1895, under discussion in this case said:

"It is claimed first that this law violates the principle of the uniformity in providing for the assessment of the logs of a non-resident at a different time than that provided in the case of residents; second, that for the same reason it discriminates unjustly against non-residents. But I am of the opinion that the case does not come within either of these principles. The constitution, says the court, provides that the rule of taxation shall be uniform. This would be the law if there were no constitutional provision on the subject. But this does not mean that the time and method of assessment shall be identical, but only that after the Legislature has declared what classes of property shall be subject to taxation; the tax itself shall be levied on such property or the owner thereof according to a uniform rate of valuation."

*Nelson Lumber Co. vs. Town of Loraine*, 22 Fed. Rep. 54.

Cross appellants' contention that the import of the law complained of in this action "is simply nothing more nor less than to tax domestic animals in those reservations, and will not admit of a construction broad enough to reach all classes of personal property, such as merchandise, choses in action, growing crops, household goods, farming implements and other property of like character."

The general Revenue Act of the Territory, Chapter 70, Article 1, provides for the taxation of all property, both real and personal, found in the Territory of Oklahoma, except such as is expressly excluded therefrom, and includes all the property above mentioned by cross appellants. The cattle in controversy are by said general Act made taxable, as are all other kinds of personal property found in Indian reservations. The Act complained of is simply an amendment of Section 13, of Article 2, of Chapter 70, and is, therefore, a part of the general revenue law; and when taken in connection with other parts of the same law, the expression "or any other personal property" can not be limited to cattle or property *ejusdem generis*, as is contended by cross appellants.

We maintain that the law complained of was intended to accomplish a dual purpose; first, to provide an assessor and for the assessment, the Indian reservation being unorganized territory. Second, with a view to assessing and levying tax upon cattle which

might be brought into and require a *situs* in such unorganized territory and reservations between the dates mentioned in the Act.

If by misconstruction of the law the special assessor, provided for in said Act, has failed to assess personal property in said reservation other than cattle, it can afford no reason for the Court to hold that a tax properly levied upon cross appellants' property should not be valid and collectable. Cross appellants' cattle were liable to taxation under Article 1 of the general revenue law above referred to, and under Section 13, of Article 2, above referred to the special assessor was fully empowered to make the assessment.

Cross appellants in their seventh and last proposition contend "that the 35 per cent addition to the assessed valuation of said property, by order of the Territorial Board of Equalization, is unauthorized and void."

In answer to this contention, without argument, we submit the question upon the unreported decision of the Supreme Court of the Territory of Oklahoma in the case of *Bullen vs. Wallace*, which we print in full. (See appendix.)

The Act of 1895 expressly provides for the equalization of individual assessments of property in unorganized country districts. The record fails to show that cross appellants ever attempted to avail themselves of this provision, and therefore they are not in



position to complain as to the valuation of their property.

For the reasons and upon the authorities given we insist that the territorial tax involved is valid, and that the decision of the Court below so holding should be affirmed. Respectfully submitted,

HARPER S. CUNNINGHAM,

*Attorney General of the Territory of Oklahoma.*

## APPENDIX.

## IN THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

*J. R. Wallace, et al., Plaintiffs in Error, vs. H. B. Bullen, et al., Defendants in Error.*

## SYLLABUS:

1. *Injunction—Illegal Tax.* Injunction will lie in this Territory to enjoin the illegal levy of any tax, charge or assessment, or the collection of any illegal tax, charge or assessment or any proceeding to enforce the same. And without express statutory authority the general powers of a court of equity would be ample to afford such relief.
2. *Taxation.* The revenue laws of this Territory establish one system for levying and collecting taxes, and under such system all property is made subject to taxation and required to be assessed at its true value.
3. *Assessments.* The Township Assessor, Clerk and Treasurer compose a Board of Equalization for townships. The City Assessor, Mayor or President and City Clerk compose the Board of Equalization for cities, towns and villages, and such boards are authorized to hear all complaints of persons who feel aggrieved by their assessments and the decision of such boards are final as to individual assessments, except as the same may be affected by a general increase or decrease authorized by the County or Territorial Board of Equalization under their authority to equalize values between the several townships of a county or between the several counties of the Territory.
4. *Taxation—Uniform.* The limitations fixed by the laws of this Territory upon the different officers

and boards which comprise the machinery of the law for the taxing powers of the Territory, are: *First*, the taxation must be equal and uniform. *Second*, in assessing they must not affix values higher than the true cash values of the property assessed. *Third*, in levying they must not levy a higher rate than that limited by law.

5. *Taxation—Scope of Authority.* When property has not been valued for taxation beyond its true cash value, or a greater rate of taxation levied upon such value than that authorized by law, the owner of property has not been injured, and cannot be heard to complain provided his property has been taxed equally and uniformly with other property in the taxing district.
6. *Equalization—Territorial, County and Township Boards.* The Territorial Board of Equalization is a constituent part of the machinery for fixing the valuation of property for the purpose of taxation. The Township Board may increase or lower any individual assessment and the County Board may raise or lower the aggregate of assessments returned from the different townships of a county and the Territorial Board may lower or raise the valuation of the various counties.
7. *Territorial Board of Equalization—Powers of.* The Territorial Board of Equalization is the ultimate and final tribunal of review, with power of correction to the end that the valuations of property as fixed for the purposes of taxation shall be made to conform to the requirements of the law, to the end that all property shall be assessed at its true value.
8. *Uniform Valuation of Property—How Obtained.* The

honest and uniform valuation which the law expressly demands, is the assessment of property at its true cash value, and where the Territorial Board of Equalization finds that one county has returned its property at its true cash value and every other county has returned its property below the true cash value, the board may order that percentage to be added to the returns from those counties which are below such value, as will bring the latter up to the basis of the former, and the requirement of the law.

9. *Territorial Board of Equalization—General Powers of.* The statute creating the Territorial Board of Equalization conferred upon that board authority to review and correct the valuations of property for taxation returned to them by the county clerks of the several counties of the Territory, and to equalize such valuation upon the basis of the true cash value of the property, and may lawfully increase the aggregate valuation of the property in the several counties of the Territory as returned by the clerks of the several counties.

#### ERROR FROM THE DISTRICT COURT OF NOBLE COUNTY.

Action by injunction commenced on petition of *H. B. Bullen, et al. vs. J. R. Wallace, as Treasurer, the Board of County Commissioners, and the Sheriff of the County of Noble*, to restrain the defendants from collecting certain taxes. On behalf of the defendants below the case is brought to this Court by petition in error.

Mr. Attorney General and T. H. Soward for the defendants in error.

Horace Speed and H. A. Smith for plaintiffs in error.

The findings of fact and opinion of the Court were delivered by,

TARSNEY, J.

#### STATEMENT OF FACTS.

The petition in this case was filed in the Court below by H. B. Bullen and some seventy-five others, individuals, co-partners and corporations, taxpayers of Noble County, against J. R. Wallace, as Treasurer, and the Board of County Commissioners, and Sheriff of said county, praying an injunction to restrain the said Treasurer, County Commissioners, and Sheriff from levying or collecting against the petitioners or their property, certain taxes alleged in said petition to have been illegally assessed for the year 1895.

The facts presented by this record necessary to be considered in determining the controversy are, that the plaintiffs were the owners of real and personal property situated in said County of Noble and subject to assessment for, and to the payment of, taxes therein for territorial, county and other purposes for the year 1895.

That each of said plaintiffs duly made returns for taxation of the property respectively owned by them to the proper assessors for taxes within said county for the year 1895. That subsequently thereto, action was taken upon said returns and assessments were made of the property of each of said plaintiffs

by the officers authorized by law including said assessors, the Boards of Equalization of the several townships of said county, and the Board of Equalization of the city of Perry in said county.

That the said assessment rolls of the several townships of said county, and of the city of Perry were, by the County Board of Equalization of said county, duly examined and the valuations of property in the several townships, and said city of Perry, were equalized by said County Board of Equalization; and the assessment rolls of property in said county thus equalized were, as required by law, sent to the Territorial Board of Equalization. That the total assessed valuation of all the real and personal property in said county as equalized by said County Board of Equalization, was not less than the fair average valuation of property returned to the Territorial Board of Equalization by the several counties of the Territory. That the aggregate of valuation of assessments sent to the Territorial Board of Equalization from the several counties amounted to approximately the sum of twenty-eight millions of dollars. That the Territorial Board of Equalization upon receiving such assessment lists from the several counties, met and ordered an increase in valuation on the aggregate assessment of each county in the Territory, except the county of Kingfisher, claiming that the property in each county except Kingfisher County was not valued at its fair valuation. That the increase thus ordered in the several counties varied from about five



per cent. to over seventy-five per cent., and the total valuation of all the property in the Territory subject to taxation was by said board thus increased from about twenty-eight million dollars to about thirty-nine million dollars.

That said Territorial Board of Equalization ordered that the valuation of all property returned by the Board of Equalization of Noble County should be increased 35 per cent. That the County Clerk of Noble County, upon receiving a certificate from the Territorial Board of Equalization ordering such increase, immediately proceeded to change the lists of valuation, and increased the valuation of all the property of the plaintiffs respectively as fixed and returned by the assessors, and by the County Board of Equalization, 35 per cent, and extended such valuations thus increased upon the assessment roll of said county and upon the assessment of the property of each of said plaintiffs upon said roll. That at the time said Territorial Board of Equalization increased the valuation of the property returned for taxation in said county 35 per cent., said board also fixed the rates of levy for taxation for territorial purposes as follows:

Normal School fund levy, one-half mill on the dollar; University fund, one-half mill on the dollar; Bond Interest fund, one-half mill on the dollar; Board of Education fund, one-tenth of one mill on the dollar; General Territorial fund, three mills on the dollar. That these rates were the maximum rates

for each of said funds allowed by law; that the taxing officers of said county levied the several rates as also the several rates from the different county funds and purposes ordered by the county commissioners, and the tax roll was extended upon the books of the County Treasurer with these several rates levied upon all the property in said county, including the property of the plaintiffs respectively, upon the basis of valuation fixed by the Territorial Board of Equalization. That thereby the tax charged against and sought to be collected of each of the plaintiffs was and is 35 per cent greater than the same would have been had not said Territorial Board of Equalization increased the valuation as stated. That each of said plaintiffs had tendered to said County Treasurer the amount of taxes charged upon the books of said Treasurer against said plaintiffs respectively, less 35 per cent of the amount thereof, which tender was refused by said Treasurer. That said taxes so levied are a lien and incumbrance upon the property of plaintiffs respectively; that said County Commissioners have ordered said Treasurer to collect such taxes for the use and benefit of said county and territory and that said Treasurer, at the time this action was instituted, was about to collect the whole of such taxes, including the 35 per cent increase as stated.

The basis of the action of the Territorial Board of Equalization, which is complained of as being without warrant of law and illegal by plaintiffs, is shown by a copy of the record of said board attached

to the answer of the defendants and made an exhibit therein, and said record, as shown by said exhibit, is as follows:

EXHIBIT "A."

Guthrie, Okla., June 17, 1895.

Agreeable to the provisions of Art. 1, of Chap. 43 of the Session Laws of 1895, the Territorial Board of Equalization met in the office of the Territorial Auditor in the city of Guthrie at 5:30 o'clock p. m., Monday, June 17, 1895, the following members being present: T. J. Lowe, Territorial Secretary, and E. D. Cameron, Territorial Auditor; Gov. W. C. Renfrow was absent on account of sickness. The Board organized by electing T. J. Lowe president and E. D. Cameron secretary. Returns of assessments not having been received from the Counties of Day, Grant, Noble and Pawnee, the Board adjourned to meet at 10 o'clock the following Thursday, June 20.

Guthrie, Okla., June 20, 1895.

The Board met pursuant to adjournment. Present: T. J. Lowe, president; E. D. Cameron, secretary. On examination and comparison of the returns of assessment from the several counties, the average rate of valuation of Kingfisher County was found to be the highest, and in the opinion of the Board, the most equitable and the most nearly in accordance with the law requiring all the property to be assessed at its actual cash value. The valuation of Kingfisher County was therefore adopted as a basis for equalization. The Secretary of the Board was directed to compute from the various returns of assessments the percentage required to be added to each for the purpose of equalization on the above basis.

Board adjourned to meet at 3 o'clock p. m.

AFTERNOON SESSION.

The Board met at the time designated. From the computations made by the Secretary of the Board it was found necessary to make the following per centum increase, and it was by the Board so ordered: Kingfisher, 00; Beaver, 75; Blaine, 20; Canadian, 45; Cleveland, 20; "D," 50; Day, 30; "G," 30; Garfield, 35; Grant, 30; Kay, 35; Lincoln, 35; Logan, 45; Noble, 35; Oklahoma, 30; Pawnee, 25; Payne, 25; Pottawatomie, 35; Roger Mills, 5; Washita, 30; Woods, 40; Woodward, 40.

The property of the Western Union Telegraph Company, where not already assessed to the railroad companies by the Territorial Board of Railroad Assessors, was valued at \$40 per mile for the first wire of line, and \$10 for each additional wire. The following levies for Territorial purposes for the year 1895, were ordered, and the Territorial Auditor was directed to certify the same to the several counties for collection. For General Revenue fund, three mills on the dollar of assessed valuation; for Normal School fund one-half mill on the dollar of assessed valuation; for University Fund, one-half mill on the dollar of assessed valuation, for Bond Interest fund, one-half mill on the dollar of assessed valuation; for Board of Education fund, one-tenth mill on the dollar of assessed valuation. The Auditor was ordered to forthwith make the necessary returns of the findings of the Board to the several county clerks as by law provided. The Board adjourned *sine die*.

E. D. CAMERON,

*Territorial Auditor and Secretary Board of Equalization*

The Court below sustained the demurrer to the answer of the defendant, and the defendants refused further to plead, the Court entered judgment upon the facts stated in the plaintiff's petition, granting a perpetual injunction, restraining the defendant from collecting or enforcing the payment of 35 per cent. of the taxes assessed against them as stated. To the action of the Court in sustaining said demurrer to defendant's answer, and in rendering judgment for the plaintiffs, the defendants duly excepted, and have brought the case to this Court by petition and summons in error. The assignments of error are:

*First*—That the Court erred in holding that the 35 per cent. added to the valuation of plaintiff's property by the Territorial Board of Equalization and entered on the tax roll of Noble County against the property of the plaintiffs, was illegal and made without authority of law.

*Second*—That the Court erred in granting a perpetual injunction against the collection of the tax levied on said increased valuation of the property of each of defendants in error.

#### OPINION OF THE COURT.

The contention of defendants in error is that the action of the Territorial Board of Equalization in raising the valuation of the property in Noble County 35 per cent, and in all the other Counties in the Territory, except the County of Kingfisher, by the percentage shown, without diminishing the valuation

of the property returned from said County of Kingfisher, thereby increasing the aggregate of the value of all the property returned for taxation in all the counties of the Territory over the valuation fixed and returned by the several boards of equalization to the amount of about eleven millions of dollars, was without authority of law. That that part of the taxes levied upon the property of the defendants in error which resulted from such increased valuation, was levied without authority of law, and is therefore void, and that as to such part of the levy against their property they are entitled to relief by injunction.

Counsel, both in their briefs and in oral arguments to the Court, have presented a number of questions, touching the sufficiency of the pleadings, and the rulings of the trial court thereon; but in view of the fact that this case involves, not only the rights of the parties of record, but also involves grave questions of public concern, we have concluded to waive consideration of mere technical questions and consider only those questions which involve upon the merits, the substantial rights of the parties and of the public.

If the contention of counsel for defendants in error that the action of the Board of Territorial Equalization was without authority of law, and that that part of the taxes upon their property which resulted from the unauthorized act of such board was illegal, will injunction lie to prevent the collection of such illegal tax?

We think in such case a court of chancery has



jurisdiction, and that relief may be granted by injunction. In this Territory there is express statutory authority therefor. By Section 4143, of the Statutes of Oklahoma, Statutes of 1893, it is provided; "An injunction may be granted to enjoin the illegal levy of any tax, charge or assessment, or any proceeding to enforce the same, and any number of persons, whose property is affected by a tax or assessment so levied may unite in the petition filed to obtain such injunction."

Without this express statutory authority, we think that the general powers of a court of equity, would be ample to afford relief in the case stated. Numerous well considered cases would indicate the principle as settled that a court of chancery has jurisdiction, and when invoked will assume to exercise it in all cases where a tax has been levied without authority of law, or where the property is not subject to taxation.

Cooley on Taxation, Sec.—; 77 Ill., 538, and cases cited

While we hold that this statute does not create a new remedy but was intended to enlarge the jurisdiction of courts of equity to restrain the illegal levy or collection of a tax, we are not required in this case to decide that this remedy may be invoked in every case where a tax has been irregularly or illegally assessed or levied; or, that it may be invoked in any case without the party invoking it bringing himself within the general principles of equitable relief in addition to

establishing the illegality complained of. We simply hold that if the act complained of in this case was without authority of law, the case, as presented brings the defendants in error within the general principles of equitable relief, and that the Court below had jurisdiction.

The remaining question—the vital question in controversy in this case is: Was the action of the Territorial Board of Equalization complained of without authority of law? It will not be denied, that if there was a total want of authority in the Territorial Board of Equalization to increase the valuation in the manner shown and complained of, that defendants in error are entitled to the relief prayed for. Our sole inquiry, therefore, will be; whether there is any authority for the action of said Board in adding 35 per cent. to the assessed valuation of property in Noble County by which the plaintiff's assessments and taxes levied thereon was so much enhanced.

Construing the revenue law of the Territory as establishing one system for levying and collecting taxes, it here, as often happens, that the obscurity that may appear in one section is removed by reference to other sections on the same subject. By the Revenue Law of the Territory all property is made subject to taxation, and all such property is required to be listed and assessed. An assessor of property is provided for in each township and city of the Territory. Every property owner is required to furnish the assessor an itemized account of all classes of prop-

erty owned or held by him or her, which by law is subject to assessment with the true value thereof. The assessor may require the property owner to verify such list or statement by oath or affirmation, and if such property owner neglect or refuse on demand of the assessor to give, under oath or affirmation, the statement required, the assessor shall ascertain and estimate from the best information he can obtain the number, amount, and cash value of all the several species of property required and list the same accordingly. If any person shall wilfully make, or give under oath or affirmation a false list of taxable property or place a false value thereon, he is to be deemed guilty of perjury. The assessor of each township and city, is required, from all lists and statements returned to him by property owners, and from all lists and statements made by himself, where property owners have neglected or refused to make return of such statement as required by law, to make up an assessment roll, and attach thereto his oath, which among other things shall state, that the assessor has diligently and to the best means within his power endeavored to ascertain the true amount of the value of the property returned, and that he verily believes the full value thereof is set forth in said assessment roll, and said assessor shall deliver such assessment roll and oath attached to the county clerk of his county on or before the first Monday of May, annually. The Township Assessor, Clerk and Treasurer compose a Board of Equalization for townships. The City Asses-

sor, Mayor or President, and City Clerk compose a Board of Equalization for cities, towns and villages, and such boards are authorized to hear all complaints of persons who feel aggrieved by their assessments, and the decision of said boards are final as to individual assessments, except as the same may be modified by a general increase or decrease in value ordered by County or Territorial Boards of Equalization in equalizing values between the several townships in the county, or between the several counties in the Territory. The Board of County Commissioners constitute the board of equalization for the several counties. Their duties are to equalize the assessment rolls in their county between the different townships. After such assessment rolls are thus corrected and equalized, the clerk of the county is required to make out an abstract of the same and transmit such abstract to the Auditor of the Territory.

The decision of this case depends on the construction that shall be given to these provisions of law, and to section 2624, of said law, as amended by an Act approved March 8, 1895. which said amended section reads as follows.

‘ The Governor, Territorial Auditor and Secretary shall constitute the Territorial Board of Equalization, and said board of equalization shall hold a session at the capital of the Territory, commencing on the 3d Monday of June each year; and it shall be the duty of said board to examine the various assessments and to equalize the same, and to decide upon the rate of territorial tax to be levied for the current

year, together with any other general or special territorial taxes required by law to be levied, and to equalize the levy of such taxes throughout the Territory. And shall therefrom find the percentage that must be added to or deducted from the assessed value of each county, and shall then order the percentage so found to be added to or subtracted from the assessed values of each of the various counties of the Territory, and shall notify the various clerks of the percentage so ordered to be added to or subtracted from the valuation of property in their respective counties. It shall then be the duty of the various county clerks to add to or deduct from the total value of the property assessed to each party, the percentage so ordered, and collect the taxes accordingly. Said board shall assess the rolling stock of railroads, and all other property not otherwise provided for."

Section 1, of Article 6, of Chapter 70, of the Statutes of the Territory of Oklahoma, as amended by an Act approved March 8, 1895, reads as follows:

"Section 1. The rate of general territorial tax shall not be less than one-half mill nor more than three mills on the dollar valuation, and in addition, one-half mill each year for the erection and support of a Territorial Normal school, and one-half mill each year for the erection and support of a Territorial University, and such levies for county purposes as are hereinafter provided, and such other taxes as may be authorized by law."

These various provisions and sections provide a comprehensive plan and scheme for the assessment and levy of taxation for the support of the territorial county and municipal governments. Each officer or

board had a separate and distinct jurisdiction within which he or it has distinct duties to perform, and for which there is a distinct and clearly defined authority of law. These several officers and boards may be said to comprise the machinery of the law for exercising the taxing powers of government. Each must act within the special scope of his or its authority, and when so acting, the only limitation that we can discover to the combined authority and jurisdiction of all is, that their imposition of taxation must be equal and uniform; in assessing they must not fix values higher than the true cash values of the property assessed; and in levying they must not levy a higher rate than that limited by the law. In other words, the general scope of the jurisdiction and powers of the taxing authorities is to impose taxation upon property assessed at its true cash value, and at a rate not exceeding the maximum fixed by law, and when the authorities have proceeded and acted within the scope of their authority as thus defined, and property has not been valued for taxation beyond its true cash value, or a greater rate of taxation levied upon such value than that authorized by law, the owner has not been injured and cannot be heard to complain, provided his property has been taxed equally and uniformly with other property in the taxing district.

While it is asserted by counsel for defendants in error that the Board of Equalization of the Territory acted without authority of law in increasing the



value of the property in Noble County 35 per cent it is not contended by them that such board had no authority in any case or for any purpose to change the valuation of such property as returned by the assessor. It must be conceded that the Board of Equalization is a constituent part of the machinery for fixing the valuation of property for the purpose of taxation. The valuation by the assessor is not final because upon complaint the township board may increase or lower any individual assessment. The action of such Township Board is not final because the County Board, while it may not directly upon an individual assessment, is yet directly authorized in equalizing aggregate valuation of the several townships to lower or raise the aggregate value as returned for any of such townships; and the Territorial Board, it must be conceded in the exercise of its admitted functions to equalize the valuations of the various counties, may lower or raise the valuation as returned from any county. In fact, it is mandatory upon them that they shall, if inequality exists. No other deduction can be drawn from this system than that it was intended that in the determining of valuations for taxation, the Township Board should exercise the powers of review and correction over the work of the assessors; that the County Boards should exercise like powers of review and correction over the work of the Township Boards; and that the Territorial Board should be the ultimate and final tribunal of review with power of correction to the end that such valuation might be made to

conform to the requirements of the law; viz, the true value of the property.

Counsel for defendants in error, while conceding that the board may increase or diminish the aggregate valuation of any county for the purpose of equalizing such valuations with the valuations of the other counties yet contend, in the words of the statute granting the power, "*to examine the various county assessments, and to equalize the same,*" limits and restricts the powers of said Board to equalizing and adjusting valuations already fixed; that the term *assessments* is synonymous with *valuations*, and here import values already determined. That such valuations already fixed are the aggregate of material with which the board could deal; that they may adjust, equalize and distribute this aggregate of valuations among the several counties, but that they cannot add to its value.

In support of this construction we are cited to the cases of

*People, ex rel Crawford vs. Lothrop*, 3 Col. 428.

*Kittle vs. Sherwin*, 11 Neb., 66.

*State ex rel Lincoln vs. Edwards*, 31 Neb. 370.

*Kimball vs. Savings L. & T. Co.*, 89 Ill. 611.

*Orr vs. State Board of Equalization*, Supreme Court of Idaho, 28 Pac. Rep. 416.

A careful analysis of these cases will lead to the conclusion that none of them, unless it be the Colorado case, will, even apparently support the contention of defendants in error.

In *Kittle vs. Sherwin*, 11 Neb. 66, the City Council of the city of Fremont, sitting as a Board of Equalization, without any notice to the taxpayers, or to the plaintiffs, raised the assessed value of each and every assessment in the city 10 per cent above the assessed value made by the assessor, and the valuation of the plaintiff's premises and all property in said city was 10 per cent higher in its assessed value than the same was for state and county purposes assessed. The relative value of the property assessed was not changed.

The Court held the City Council sitting as a Board of Equalization had no power to thus raise the assessed value of all property assessed in the city; that such raising of valuation was not equalizing in any sense. We have already shown that the powers of a City or Township Board of Equalization is limited to action upon individual assessments, consequently they have no authority to increase the value of the aggregate of assessments in the city or townships by a uniform percentage, and the principle of that case bears no analogy to the case before us.

In *State, ex rel Lincoln Land Co. vs. Edwards*, 31 Neb. 370, the Court construed and applied a statute of the state which in express terms prohibited the Board of County Equalization from reducing or increasing the aggregate valuation fixed and returned by the assessor, except such increase or reduction as should be incidental merely.

In the case cited from the Supreme Court of Idaho,

*Orr vs. State Board of Equalization, Supra*, the State Board of Equalization was by statute invested with power "to raise or diminish the valuation of the several counties," but the manner in which this should be done was clearly directed by the statute as follows:

"*First*—They shall add to the aggregate valuation of real and personal property of each county which they believe to be valued below its proper valuation such percentage in each case as will raise the same to its proper valuation," and

"*Second*—They shall deduct from the aggregate valuation of real and personal property of each county which they believe to be valued above its proper value such percentage in each case as will reduce the same to its proper valuation."

The powers of the board were clearly limited by the statute. They were authorized to raise or diminish the calculation of the several counties, but only in the manner directed by the statute; viz, they might add to the aggregate valuation of property of each county which they believe to be valued below its proper valuation; or they might deduct from the aggregate value of the property of each county, which they believed to be valued above its proper valuation. The board in that case undertook to add to the valuation of the sheep in Bingham County an amount sufficient to fix a valuation thereon at the sum of two and fifty-one-hundredth dollars per head. In like manner they undertook to add to the valuation of the cattle of said county for purposes of taxation of the same percentage of 10 per cent. on the

assessed valuation thereof as returned by the assessor of said county. They also undertook to order and adjudge that the Utah & Northern Railway from Pocatello northward to the state line between Idaho and Montana should, for the purpose of taxation be a branch road and that the valuation thereof should be reduced from eight thousand dollars per mile to five thousand dollars per mile, and also undertook to deduct from the valuation of a part of the Oregon Short Line Railway lying in said County of Bingham, and from a portion of the Utah & Northern Railway, lying south and east of Pocatello as fixed by the assessor of said county and not changed by any County board of equalization, the sum of one thousand dollars per mile for each and every mile thereof. The Court in that case held correctly, as we think it must be conceded, that under the special restricted authority to equalize valuations between the several counties by adding to or subtracting from the aggregate valuation as returned by the Assessor and County Board of Equalization by a certain percentage, no authority could be deduced therefrom authorizing such board to increase or diminish the valuations fixed upon specific classes of property, and hence, we find nothing in that case bearing in any manner upon the principle contended for in the case before us.

The case of *Kimball vs. Merchants Savings L. & T. Co.*, 89 Ill., 611, arose under a statute which provided as follows:

"It (the County Board), shall ascertain whether

the valuation in one town or district bears a just relation to all the towns and districts in the county, and may increase or diminish the aggregate valuation of property in any town or district by adding to or deducting such sum upon the hundred dollars *as may be necessary to produce a just relation between all the valuations of property in the county.*"

It further provided that such board should not in any instance reduce or increase the valuation of all the towns and districts as made by the assessor, except in such manner as might be actually necessary and incidental to a proper and just equalization. The complainant in that case in the spring of 1887 returned to the Assessor of the town of South Chicago a statement of its personal property liable to taxation, and placed upon it a valuation of \$500,000. It was so returned to the County Clerk without modification. The County Board of Equalization added 20 per cent. to the assessed valuation of personal property in the town of South Chicago, but made no changes in other towns. The per cent added to personal property in South Chicago increased the aggregate value of assessed property in that town over \$2,000,000 and consequently increased, by a large per cent. the aggregate assessed value of the entire property of the county. The 20 per cent. added by the County Board to the complainant's property increased that valuation to \$600,000. The state board of equalization directed that 57 per cent be added to the assessed value of personal property in Cook County, and thus the valuation of complainant's property was raised by

the County Board from \$500,000 to \$600,000, and by the State Board to \$942,000, and upon this latter sum was computed and extend the several kinds of taxes for said year. No question was raised or discussed in the case relating to the action of the State Board in raising the assessment 57 per cent. That appeared to be conceded as authorized and legal. The question was in regard to the action of the County Board in making the 20 per cent increase, and that was held to be illegal because of the limitations of the statutes upon the powers of a County Board.

The Court, in its opinion and distinguishing the case they were considering from a case previously decided by the same court, said:

"The case of *Scammon vs. The City of Chicago*, 44 Ill. 269, cited is not an authority in the case we are considering. That case arose under a different law—one that conferred power upon the board acting for the purpose of equalizing assessments to add to, take from or otherwise correct and revise the same, without imposing any limitation upon their discretion in the matter."

Construing the powers of the County Board under the statute they were then considering, that court said:

"The powers such boards may rightfully exercise are defined and limits fixed beyond which they may not go. All acts beyond the restrictions are void as being without authority of law."

Each of these cases are dissimilar in almost every feature from the case before us. Each dealt with the



powers and functions of minor boards of equalization, (except the Idaho case) those of counties or cities not possessing final powers of review and correction whose authority to increase or diminish the aggregate of valuations of property for taxation within their respective districts was by statute expressly inhibited, or expressly granted and limited.

The case cited from the Colorado court more apparently bears out the contention of defendant in error. In that case [3 Col. 428] it was shown that the state board of equalization, for the year 1877, increased the aggregate valuation of the real and personal property of each of twenty counties of the state above the valuation as returned by the several clerks of such counties. That the aggregate of the increase in said twenty counties amounted to upwards of \$5,000,000. That at the same time they diminished the aggregate valuation of four other counties to the amount of about \$49,000; that they made no changes of the valuation of the property of the other counties of the state; that the net increase of the aggregate valuation of all the counties of the state above the aggregate valuations returned by the clerks of the several counties was about \$5,000,000.

The Constitution of the State of Colorado defined the duties of the State Board of Equalization to be "to adjust and equalize the valuation of real and personal property among the several counties of the state." It also provided for the election in each county in each alternate year of a County Assessor,

thus making the assessor of taxes a constitutional officer, and the statute of the state provided for the election of a County Assessor and defined his qualifications and duties. It also provided that the County Commissioners of each county should constitute a Board of Equalization for the "correction and completion" of the assessment rolls with power to supply omissions in said rolls, and for the purpose of equalizing the same to increase, diminish or otherwise alter or correct any assessment or valuation. It constituted such board a quasi court to hear any and all complaints with sole power to adjust and correct the assessment rolls as in their judgment they might deem proper and right. It constituted such board a board of appeals and review for the purpose of ascertaining, determining and fixing the value of taxable property in each county in the state as a basis of taxation. After reviewing the constitutional and various statutory provisions of the state relating to the assessment and valuation of property for taxation that court said:

"Looking then to the provision of the constitution and the statute, we are clearly of the opinion that the power to fix and determine the valuation of taxable property is lodged by them in the assessor and that when they have, under the law, performed this duty and exercised this power that the sum of the valuation of the several counties so by them found must be taken as the aggregate valuation of all the property in the State, and is conclusive and final as against the State Board of Equalization. The state board may, for the purpose of adjusting and equaliz-

ing, increase the aggregate valuation of one county, and decrease the aggregate valuation of another, but they have no power to increase the sum of all the valuations of the valuations of the several counties of the State. That aggregate valuation has been found for them, and fixed by the authorities, and in the mode prescribed by law. This view is not only sanctioned by the force of the general provisions of the statutes considered as a whole, but, also, by the phraseology of the sections under consideration. The board is to adjust and equalize the valuation. This term, valuation, here imports values already estimated and fixed, and must be referred for the measure of its force and meaning to the mode prescribed by law for estimating and fixing valuations. The aggregate material with which the board can deal is thus limited. They may adjust and equalize it among the several counties, but they can not add to its volume."

It is not necessary that we should dissent from the reasoning or conclusion of the learned Court in that case in order to arrive at a different result in the case we are considering. The Court found sanction for its views in that case in the peculiar provisions and phraseology of the statute which they were construing. The section of the Colorado Statute creating Boards of County Equalization and defining their duties, is peculiarly different from ours; there the board was created "*for the correction and completion of the assessment rolls,*" with power to supply omissions in the same, and for the purpose of equalizing the same, "*to increase, diminish or otherwise alter and correct any assessment or valuation.*"

The statute contemplated but one assessment for state and local taxes. The action of the County Board was final as to local taxation, made final by express statutory terms. The state board was created to adjust and equalize.

For that purpose the board was required by statute (Gen'l Laws Col. sec. 42, p. 756,) to "examine the various assessments *as far as regards the State tax*, and equalize the rate of assessment of the various counties whenever they are satisfied *that the scale of valuation has not been adjusted with reasonable uniformity* by the different assessors." By section 43, of the same, the board is required to ascertain whether the "valuation of real estate in each county bears a fair relation or proportion to the valuation of all other Counties in the State, and on such examination they may increase or diminish the aggregate valuations of real estate in any county as much as in their judgment *may be necessary to produce a just relation between all the valuations of real estate in the state*, but in no instance shall they reduce the aggregate valuation of all the counties below the aggregate valuation as returned by the clerks of the several counties."

It is obvious that a much greater authority and finality of action was conferred upon the County Boards of Equalization by the Colorado Statutes than is conferred upon the same boards by the statutes of this Territory, and it is equally obvious that the powers and duties of the State Board of Colorado, as limited and restricted by statute, are entirely dissim-

ilar from those of the Territorial Board of this Territory. True, the general definition of their duties are substantially the same. In our statute "to examine the various county assessments and to equalize the same." In the Colorado Constitution, "to adjust and to equalize the valuation of real and personal property among the several counties of the State." Our Territorial Board is authorized to find the percentage that must be added to or deducted from the assessed value of each County and to order the percentage so found to be added to or subtracted from the assessed values of each of the various counties of the Territory" to be added to or deducted from the assessed value of each county. The natural construction of this language would authorize the percentage which the board should find proper to be added to the assessed value of each or every county in the Territory, or to be subtracted from each or every county in the absence of any inhibition against increasing or diminishing the aggregate of assessed value. We think this was the intention of the Legislature. Had they intended to vest the board with power to equalize only in the sense of distributing equally among the several counties their portion of the aggregated valuation returned, this would necessitate both increase and decrease and the Legislature would have used language more apt to express such limitation or purpose. Under the Colorado Statutes the board dealt only with the "*scale of valuation.*" They were only authorized to act when they were satisfied that

the "*scale of valuation had not been adjusted with reasonable uniformity*" by the assessors. In this Territory, the board, we think, is authorized to act, not on the scale of valuation as returned and for the purpose of securing uniformity in such scale, but upon the valuation for the purpose of securing an honest and uniform valuation of property for taxation. That honest and uniform valuation which the law expressly demands, that is, its assessment and valuation at its true cash value. The Board of Equalization found on examination, that property in Kingfisher County had been honestly assessed and returned at its true cash value. They further found that in every other county of the Territory property had been assessed and returned with valuations fixed at from five to seventy-five per cent. below the true cash value, and they ordered that percentage to be added to the return valuation of each of the counties except Kingfisher, that would make the assessment the true value, and thus equalize the valuation of all the counties upon the basis of the requirement of the law. In this, we think, they were acting within the scope of their authority. They might have reduced the valuation of property in Kingfisher County by a few hundred thousand dollars, or by a million, and distributed that amount among other counties, and thus equalized and made uniform the valuation of the several counties; but, we think, that is not the equalization that is contemplated by law; that that which is contemplated is that all property shall be assessed at its true

value, and that when it is so assessed, and then only, can there have been a proper equalization.

We are supported in the conclusion we have arrived at in this case by the authority of *Black vs. McGonigle*, 103 Missouri, 78. In that case the County Board of Equalization of Knox County for the year 1888, made the following order:

"Ordered by the Board of Equalization that they have and do hereby equalize the valuation and assessments on all real estate in the County of Knox, and in the various townships therein, taking the assessed valuation of real estate in Center Township as a basis, and do hereby equalize and raise the valuation of all real estate in the following townships:"

Then follows a list of the other nineteen townships of the county with the increase ordered, varying from thirty-five to fifty per cent. It was asserted that this was beyond the authority of the board, as in this case it was insisted that one township or taxing district could not be taken as a basis, and the assessment of all the other townships or districts raised to that basis, thus increasing largely the aggregate of the valuation of the county, an injunction was brought to restrain the collection of the excess of taxation resulting therefrom. In that case Mr. Chief Justice Black says:

"The first contention of the appellant is that the action of the board in raising the assessed values of real estate in all the townships, except one, by a single order on a percentum basis, is illegal and void. The propositions contained in this objec-



tion must, of course, be determined by the statute. Section 6672, Rev. St. 1879, gives to the board power "to hear complaints, and to equalize the valuation and assessments upon all real and personal property within the county;" and it is then made the duty of the board "to equalize the valuations and assessments of all such property, both real and personal, so that each tract of land shall be entered on the tax book at its true value." \* \* \* \* The law, however, clearly contemplates that all property shall be assessed at its true value, and if, in the opinion of the board, this has not been done, then the assessment may be increased so as to comply with the spirit and intention of the law. Where the lands in one township have been assessed at their true value, and those in another township have been assessed at a uniform lower rate, then the assessed value of the lands in the latter may be brought up to the standard of the former, and that is what appears to have been done in the present case. In such a case it is not necessary to specify each parcel of land thus increased. It is sufficient to increase the assessed value of all the lands in the particular township by one order; and this increase may be made on a per centum basis." With the support of the authorities.

In view of the Act of Congress which prohibits any political or municipal corporation, county or other sub-division in any of the territories of the United States from becoming indebted in any manner, or for any purpose, to an amount in the aggregate, including existing indebtedness exceeding four per centum on the value of the taxable property within such corporation, county or sub-division, to be ascer-

tained by the last assessment for territorial and county taxes previous to the incurring of such indebtedness and declaring all bonds and obligations in excess of such amount given by such corporation, county, etc., void, and in view of the fact that subsequent to the making of the assessment complained of in this case, and prior to the commencement of this action, many of the counties and municipal corporations therein of this Territory had in good faith, and for proper public purposes, relying upon the validity of such assessment, increased their bonded and other obligations and indebtedness to an amount in excess of four percentum of the value of the taxable property within such county or municipal corporations as the valuation of such property was assessed and returned by the County Boards of Equalization of such counties for taxation for the year 1895; and that parties not parties to this record have in good faith, and for valuable considerations before the commencement of this action, became the purchasers and holders of such indebtedness; this Court, having regard for public honor, faith and credit, can not consent that the ordinary and common rules for construing a public statute should be violated or strained and clearly expressed legislative intent be disregarded when such departure from established rules of interpretation would clearly result in the violation of private rights, and the impairment of public faith, and might seriously impair the usefulness of territorial, county and municipal governments by depriving them of the just

revenue necessary for a proper discharge of their functions.

We hold that the statute creating the Territorial Board of Equalization conferred upon that board authority to review and correct the valuations of property for taxation returned to them by the County Clerks of the several counties of the Territory, and to equalize such valuation upon the basis of the true cash value of the property, and that they may lawfully increase the aggregate of valuation of property in the several counties of the Territory returned by the said several clerks of the several counties; that the several acts of said board complained of in the petition in this cause was within the jurisdiction of said board, and authorized by law.

That the taxes, the collection of which is sought to be enjoined, was assessed and levied according to law.

The judgment of the Court below will be reversed and the cause dismissed.

All the Judges concurring, except Bierer, J., not sitting, having presided as Judge below; Justice McAtee dissents.



IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1897.

A. M. THOMAS, J. B. HART, and  
H. B. OWENS, as the Board of  
County Commissioners of Kay  
County, Oklahoma Territory, *et al.*,  
*Appellants.*

vs.

D. P. GAY and A. S. REED, partners  
as GAY & REED, *et al.*,  
*Appellees.*

No. 287.

D. P. GAY and A. S. REED, partners  
as Gay & Reed, *et al.*,  
*Appellants.*

vs.

A. M. THOMAS, J. B. HART and H.  
B. OWEN, as the Board of County  
Commissioners of Kay County, Ok-  
lahoma Territory, *et al.*,  
*Appellees.*

No. 439.

*Appeals from the Supreme Court of the Territory of  
Oklahoma.*

**Brief on Behalf of Cross Appellants, Gay & Reed, Et al.**

## STATEMENT OF THE CASE.

This was an action in the District Court of the County  
of Kay and Territory of Oklahoma, brought by D. P.  
Gay and A. S. Reed, partners as Gay & Reed, and

twenty-five other firms and individuals, against the county officers of Kay County, Oklahoma Territory, to restrain the collection of territorial and county taxes attempted to be levied and collected by the said officers of Kay County on the property of the plaintiffs located in the Osage and Kaw Indian reservations, and in that part thereof which had been, by order of the Supreme Court of the Territory of Oklahoma theretofore attached to the said County of Kay for judicial purposes.

The parties joined in bringing suit to restrain the collection of these taxes under section 265 of the Civil Code of Oklahoma Territory, which authorizes any number of persons whose property is affected by a tax or assessment to unite in the petition filed to restrain the collection of such taxes.

The petition states the facts on which the case was tried, the defendants demurring thereto (see record page 17) and when the case came on to be tried on January 8th, 1896, it was agreed in open court that the demurrer should be carried to the relief demanded in whole or part and that the case be submitted to the final consideration of the court upon the petition and the demurrer, and upon the law applied to the facts stated in the petition, and that the plaintiffs should be entitled to any or all relief in whole or in part, which the facts in their petition would warrant, and that relief should be denied in the same manner, and in fact submitting the entire controversy on the facts stated in the petition, authorizing the court to render final judgment as such facts would warrant, under the law. In short the petition was treated as an agreed statement of facts. (See record, pages 18 and 19).

The petition (record pp. 7 to 16, inclusive), states the facts as follows:

"*Second.* That the boundaries of the said County of Kay and Territory of Oklahoma were established by the Secretary of the Interior, the said territory comprised in said county being a part of the Cherokee Outlet, opened to settlement on the sixteenth day of September, A. D. 1893, under and by virtue of the President's proclamation opening the same to settlement, and the Secretary of the Interior established the boundaries of such county as follows, to-wit :

"The said county is bounded on the north by the State of Kansas; on the east by the Arkansas river; on the south by the Ponca Indian Reservation and by the sixth standard parallel, and on the west by the range line between ranges two and three, west.

"That immediately upon the opening of the said Cherokee Outlet to settlement, a county government was established in said Kay County, and within the boundaries herein described, and that the boundaries of said county have remained unchanged from thence until the present time.

"*Third.* That the Supreme Court of the Territory of Oklahoma, on the third Monday of February, 1894, and by order duly entered on the journal of said Court, attached to the said county of Kay, aforesaid, all of the following Indian Reservations and territory, to-wit :

"All of the Kaw or Kansas Indian Reservation and all of the Osage Indian Reservation north of the township line dividing townships twenty-five and twenty-six, north.

"That all of said territory is without the boundaries of the said Kay County as established by the Secretary of the Interior, and that the said order of the Supreme Court aforesaid attached the said territory to said county of Kay for judicial purposes, and for judicial purposes



only, and for no other purpose whatever, and that no other change has ever been made in the boundaries of the said county of Kay and Territory of Oklahoma by virtue of any other authority, or pretended authority, whatever than the annexation of the said Indian reservation to the said county for judicial purposes, as aforesaid, and that no extension of the boundaries of the said county of Kay have ever been made or attempted to be made by any authority whatever, except the order of the Supreme Court of said Territory, hereinbefore referred to.

*Fourth.* That the third legislative assembly of the Territory of Oklahoma by the act approved March 5th, 1895, being article six of chapter forty-three of the Session Laws of said Territory for the year 1895, attempted to provide for the assessment and taxation in Oklahoma of cattle kept and grazed and any other personal property situated in any unorganized country, district or reservation in the county to which such country, district or reservation is attached for judicial purposes.

"That in pursuance of said act of the legislative assembly of said Territory, the board of county commissioners of said county of Kay appointed a special assessor for the purpose of assessing all of the personal property in said Kaw Indian reservation and in said Osage Indian reservation, north of said township line, and the said assessor did, by virtue of such appointment, assess all of the personal property in the said territory so attached to the said county of Kay for judicial purposes, and returned to the county clerk of said county an assessment roll of the property by him attempted to be assessed in the said territory attached to said county of Kay for judicial purposes.

*Fifth.* That none of the plaintiffs in this action have or at any time owned any personal property whatever situated or located within the County of Kay and

Territory of Oklahoma, according to the proper boundaries thereof.

"That the said territory, attached to the said county of Kay and Territory of Oklahoma for judicial purposes, comprises the Kaw or Kansas Indian Reservation and a part of the Osage Indian Reservation, and is comprised wholly of lands owned, paid for and occupied by said Indian tribes, and consist principally of wild, unimproved and unallotted lands, which said wild, unimproved and unallotted lands, which were not needed for allotment, have been leased to these plaintiffs for grazing purposes by the Osage and Kaw Indian tribal governments, under the supervision of the agent in charge of said tribes, and with the ratification and approval of the Commissioner of Indian Affairs and of the Secretary of the Interior, for grazing purposes, as provided by Act of Congress.

"That these plaintiffs, during the year 1895 and during the month of April of said year, at the commencement of the grazing season, drove, transported and shipped to the ranges and pastures in said Indian Reservations, large herds and quantities of cattle, which were taken onto said reservations in pursuance of and by virtue and authority of said leases with the said Indian tribes, together with other articles of personal property necessary and needful in herding, grazing and caring for said cattle, and that the said plaintiffs did not at any time have any other personal property, during the year 1895, upon said Indian reservations aforesaid, and within said territory attached to said County of Kay for judicial purposes, than is hereinbefore set forth, and the said cattle hereinbefore referred to is the same identical property upon which the taxes herein complained of are attempted to be levied.

"That the plaintiffs are all residents of the State of Kansas, the State of Texas and other states, and all of

said plaintiffs are non-residents of the Territory of Oklahoma, and that the greater portion of said property was, for the year 1895, valued and assessed by the authorities of the states from whence the same was removed to the said Osage and Kaw Indian reservations prior to its removal to the said territory attached to the said Kay county, as aforesaid, for judicial purposes, and that said property of these plaintiffs, in pursuance of such assessment and valuation in the states from whence the same was removed to said Indian reservations, was duly taxed for the year 1895; and that such taxes are a valid and subsisting charge against the plaintiffs and each of them, personally, and against all of the property and estates of the plaintiffs located in such foreign states, and are enforceable against the estates and property of the said plaintiffs located within the jurisdiction of such other states and territories, and said taxes can and will be collected from the property and estates of the plaintiffs located therein.

"That none of said property of these plaintiffs was in Kay County, nor was the greater portion thereof within the said territory, attached to said Kay County for judicial purposes, at the time when other property in Kay County was valued for taxation, to-wit, the first day of February, A. D. 1895, but that the greater part of the property of the said plaintiffs, attempted to be valued and assessed by the authorities of said county of Kay and Territory of Oklahoma, was located and removed into the said territory, attached to said Kay County for judicial purposes, after the first day of April, A. D. 1895, and before the first day of May, A. D. 1895.

"That the said cattle, by reason of natural growth and increase in the market value and improvement in their condition, had greatly and substantially improved and increased in value between the first day of February, A. D. 1895, and the first day of May, A. D., 1895; that

the same class and kind of property, located in said Kay County, and also located and kept throughout the Territory of Oklahoma, during the same period improved and increased in value likewise and to the same extent, and that the same class of property located in said Territory did, during such period, greatly and substantially increase in value between such dates and during the same time.

"*Sixth.* That the said special assessor assessed and valued the property of these plaintiffs, so located on said territory attached to said county of Kay and Territory of Oklahoma for judicial purposes, as aforesaid, and assessed the same and returned the same upon said assessment roll hereinbefore referred to at a total valuation of \$760,469.00.

"That thereafter the said sum was by the clerk of said county, unlawfully and without authority, carried into the aggregate assessment for said county and by him certified to the auditor of said Territory.

"That thereafter the Territorial Board of Equalization, in acting upon the various assessments for the various counties, as certified to said board, raised the aggregate valuation of the property in said county of Kay and Territory of Oklahoma thirty-five per cent., and the county clerk of said county unlawfully carried out the raised valuation so certified to him by said Territorial Board of Equalization against the property of these plaintiffs an aggregate valuation of \$1,026,634.00 as the valuation of their said property.

"A schedule, showing the amount for which each of these plaintiffs were assessed by the said special assessor and the valuation of each individual assessment of these plaintiffs, as extended by the county clerk, on account of the action of the Territorial Board of Equalization, and the amount of taxes levied and extended against the property of each of these plaintiffs, is as follows:

NAME OF PLAINTIFF.	Valuation as fixed by Spec'l Assessor	Valuation as fixed by Ter. Board	Amount of Taxes Extended
D. P. Gay and A. S. Reed, partners as Gay & Reed .....	\$123,800	\$107,130	\$4,378.53
A. M. Miller and J. B. Johnson, as partners as Miller & Johnson .....	22,190	20,957	766.90
M. Half and S. Half, as partners as Half Bros .....	85,700	115,817	2,964.92
R. H. Harris, W. C. Harris and William Childers, partners as Harris Brothers & Childers .....	61,950	83,033	2,241.00
E. T. Comer and H. C. Comer, as partners as Comer Brothers .....	52,433	70,787	1,812.00
Jesse H. Pugh .....	17,105	23,092	591.16
J. H. Carney .....	10,340	26,109	668.39
G. M. Carpenter .....	40,172	54,232	1,388.34
Virgil Herard .....	51,675	69,761	1,785.98
G. T. Hume .....	59,970	80,690	2,065.66
W. F. Smith and W. L. McCauley, as partners as Smith & McCauley .....	8,080	10,840	277.50
W. F. Smith .....	634	842	21.55
W. W. Irons .....	6,750	9,113	233.29
C. W. Burt .....	25,945	35,026	896.66
A. I. Adams .....	6,600	8,100	207.36
A. I. Adams and Neal Shafer, as partners as Adams & Shafer .....	29,705	40,102	1,026.61
E. M. Hewins .....	18,520	25,002	640.05
Douglas Pierce and J. T. Crump, as partners as Pierce & Crump .....	6,445	8,700	222.72
James Stone .....	14,440	19,494	499.04
W. M. Holloway .....	8,840	11,934	305.51
R. H. Mosley .....	41,125	57,125	1,462.40
Drury Warren .....	8,200	11,070	283.39
T. J. Moore .....	42,815	57,125	1,462.40
J. M. Slater .....	13,820	18,657	477.62
R. W. Prosser .....	14,050	18,968	485.59
I. D. Harkleroad .....	2,400	3,240	82.94

"That the said valuation and assessment of the said special assessor of the property situated in said territory, attached to the county of Kay and Territory of Oklahoma for judicial purposes, was made on the first day of May, A. D. 1895.



"*Seventh.* That thereafter the Territorial Board of Equalization levied and duly certified to the county clerk of the County of Kay and Territory of Oklahoma tax levies for Territorial purposes, for the year 1895, as follows, to-wit:

- " General revenue, three mills on the dollar.
- " University fund, one-half mill on the dollar.
- " Normal school fund, one-half mill on the dollar.
- " Bond interest fund, one-half mill on the dollar.
- " Board of Education fund, one-tenth mill on the dollar.

Making a total of four and six-tenths mills on each dollar of valuation for the purpose of taxation levied by the Territorial Board of Equalization for Territorial purposes.

"That thereafter the board of county commissioners of the County of Kay and Territory of Oklahoma made the following levies for the year, 1895, to-wit:

- " For salaries, five mills on the dollar.
- " For contingent expenses, three mills on the dollar.
- " For sinking fund, one and one-half mills on the dollar.
- " For court expenses, two and one-half mills on the dollar.
- " For county supplies, three mills on the dollar.
- " For road and bridge fund, two mills on the dollar.
- " For poor fund of said county, one mill on the dollar.
- " For county school purposes, three mills on the dollar.

Making a total, for county purposes, of twenty-one mills on the dollar of valuation levied in said county, for the year 1895, by the board of county commissioners of said county, for county purposes.

"That the county clerk of said County of Kay and Territory of Oklahoma carried the valuations of the property of these plaintiffs on the tax rolls of said county and extended against the same, according to the county and Territorial levies aforesaid, and charged to the same taxes in the aggregate sum of \$26,174.16 for the year 1895. A detailed statement, showing the amount of taxes charged against these plaintiffs, each of them, is fully set forth in the above schedule.

"*Eighth.* The plaintiffs allege that the action of the Territorial Board of Equalization, in attempting to raise the valuation of the property of these plaintiffs, and the action of the county clerk in attempting to extend the same and such raised valuation on the tax books of said county against these plaintiffs, is null and void in this, to-wit:

"1. That said board has no power or jurisdiction to alter the assessment of property made or attempted to be made in such unorganized territory and reservations attached to the counties of the Territory of Oklahoma for judicial purposes.

"2. Because the attempted raise so made by said Territorial Board of Equalization aforesaid was not an equalization, but was an attempt upon the part of the said Territorial Board of Equalization to make an assessment which they thought would conform nearer to the value of the property in said territory than that made by the local assessors.

"That the Territorial Board of Equalization raised the aggregate valuation of all the counties in said Territory except the county of Kingfisher, which they permitted to remain, in the aggregate, as returned to said board by the county clerk of said county, and adopted the rate of valuation in Kingfisher County as their standard of valuation for all of the counties of the Territory, and raised the aggregate valuation of the other counties from five to seventy-five per cent., to bring the valuation up to what they conceived to be the standard adopted in said Kingfisher County, and which action on the part of said Territorial Board of Equalization the said plaintiffs allege to be wholly unauthorized and void.

"*Ninth.* The plaintiffs allege and aver that all the proceedings looking to the assessment and taxation of these plaintiffs are null and void for the following reasons, to-wit:



"1. Because the said article six (6) is *local* and *special* legislation; that by the laws of said Territory the property of the residents of the counties in said Territory is assessed and valued at its value on the first day of February in each year, whereas, the property of these plaintiffs located in said unorganized country attached to said county of Kay for judicial purposes, is valued as of the first day of May, at a time when it possesses substantially a greater value than the same class of property possesses on the first day of February.

"2. Because personal property which is brought into any organized county of the Territory after the first day of February and before the first day of September, is not taxable if the same shall have been assessed for taxation in some other state or territory for that year; whereas, the property of these plaintiffs that was brought into said unorganized country from other states and territories after the first day of February and after having been assessed for the year 1895, for taxation, is taxed regardless of the fact that it has already been taxed for the year 1895, in the states and territories from whence it was brought.

"That the said act makes an unequal discrimination in taxing different kinds of personal property, in violation of the Organic Act of this Territory.

"That the said Osage and Kaw Indian reservations are not now, and never have been, a part of the County of Kay, or a part of the Territory of Oklahoma for the purposes of taxation; that the residents of said Indian reservations do not receive from said Kay County any police or other protection.

"That the said Indian reservations are not a part of said County; that the residents of said Indian reservations have no voice in creating the indebtedness for which said taxes are levied to pay; that they have no voice in the election of officers for the payment of whose

salaries said levies are made; that they have no voice or benefit from the contingent fund of said County and for which the three mills' levy is made; that they have no voice in the creation of the indebtedness and derive no benefit from such debt, for which the sinking fund is provided in said county.

"That they have no protection from the court expenses incurred in said county and no voice in its expenditure; that the said Kay County does not furnish to the residents of said Indian reservation any court facilities other than are furnished to citizens of other states and territories, and that the levy of two and one-half mills made for that purpose is entirely without any benefit to the residents of said Indian reservations; that they have no interest in the county supplies and other county levies.

"That they do not participate in the benefit of the schools of said County of Kay, nor the construction of roads and bridges therein, nor do they receive any benefit or have any voice in the expenditure of the poor-fund of said Kay County; nor do the residents of the said Indian reservations derive any benefits from the said poor fund as the same is wholly expended for the use and benefit of the residents of the said Kay County.

"That the said act is illegal in that it attempts to tax the property situated in said Indian reservations for the benefit of the residents of said Kay County and that all of said taxes are illegal and void and are unjust discriminations and exactions upon the residents of said Osage, Indian reservation and said Kaw Indian reservation for the benefit of the residents of said Kay County and of said Territory.

"That the said act is void and unconstitutional in this: It is in violation of the Organic Act of said Territory of Oklahoma in this, to-wit: That it only provides for the assessment and taxation of cattle kept and grazed

and other personal property situated in said Osage Indian reservation and Kaw Indian reservation, and other Indian reservations, and does not provide for the taxation of real estate or of any personal property save and except cattle and other tangible personal property, and the said law, by reason thereof, is a discrimination in taxation between different kinds of personal property in that it exempts from taxation all real estate and choses in action and credits situated and located in said unorganized territory and reservations attached to organized counties for judicial purposes.

"That there was in said Indian reservations at the time of the passage of said act, and on the first day of May, and is now, large quantities of real estate and rights of way and station grounds of railroad companies of great value that are real estate, together with choses in action, credits, and other tangible personal property, that under the provisions of said act are not taxable and cannot be taxed.

"That the said Osage Indian Reservation and Kaw Indian Reservation are not properly a part of the Territory of Oklahoma for the purpose of taxation for Territorial purposes, nor do the residents of said Indian reservations participate in the benefits of the Territorial government; but that the said taxation throughout is taxation for a private and not for a public use, and is an illegal and unequal exaction, not in behalf of and for the use and benefit of the Territory of Oklahoma and the courts therein, but is exacted for the private use and benefit of the residents of said Territory.

"That the property of these plaintiffs was taken into said reservations under and by virtue of leases executed by said Indian tribes, by and through the Indian agent, as aforesaid, under the provisions of the laws of Congress, and approved by the Secretary of the Interior and the Commissioner of Indian Affairs, and that such taxes

attempted to be levied on the property of these plaintiffs will result directly in impairing the power of the said Indians to lease their said lands and will impair the revenue derived therefrom, and will operate as a tax upon said Indians.

*"Tenth.* That the said defendants have extended their levies against the valuation of the property of these plaintiffs as hereinbefore set out, and at the date of the commencement of this suit were threatening to, and would, except for the temporary injunctions heretofore granted in the various causes consolidated herein, have issued tax warrants and other process for the seizure of the property of the said plaintiffs and the collection of said taxes, and that the said defendants will, unless perpetually enjoined therefrom, attempt to collect and will collect said unlawful taxes, as aforesaid, from the property of the said plaintiffs."

The court decreed the following levies to be a valid charge against the property of the plaintiffs: The county levy of two and one-half mills for court expenses, and the territorial levies amounting to four and six-tenths mills, and denied the petitioners any relief on account of such levies; but enjoined the collection of all other levies, resulting in the holding of \$19,071.00 of the taxes attempted to be levied, invalid and in holding \$7,210.00 of the taxes attempted to be levied, valid.

From this judgment both parties prosecuted proceedings in error in the Supreme Court of the Territory, where the case was affirmed by a divided court on September 4th, 1896, Tarsney, J., holding to the view that the taxes were all valid, Scott and McAtee, J. J., agreeing that the judgment of the court below was right, and Dale, C. J., entertaining the view that the taxes were all invalid.

From this decision both parties appeal to this court. The cross appellants in this court contend that all of said taxes are illegal and void.

*First—Because under the Organic Act and the several statutes of the United States, the legislature of the Territory has no jurisdiction to enact laws—especially tax laws—and put them in force in these Indian reservations.*

*Second—Because said Indian reservations, under the statutes of the United States, are authorized to be leased by the Osage and Kaw tribes of Indians for grazing purposes, and the taxation of cattle kept and grazed on said Indian reservations is a direct tax upon the right of the Indian tribes to lease the same, and decreases, to the extent of the tax, the grazable value of the Indian lands.*

*Third—The said act of the legislature is unconstitutional and void in that it confers upon the Supreme Court of the Territory the right to fix taxing districts, which is a legislative function.*

*Fourth—Because the act of the legislature of the Territory under which these taxes are sought to be levied is void for the reason that it attempts to tax property situated in said Indian reservations for the benefit of the counties to which they are attached for judicial purposes, the owners and holders of the property on these Indian reservations having no interest in the taxes gathered by either of said counties or by the Territory, no voice in their expenditure, and the said Indian reservations not being within the geographical boundaries of either of said counties, and the taxing of the holders of said property by the counties of the Territory is taking*

*the property of persons holding property on said Indian reservations for the benefit of the residents of said counties and is taking private property for private purposes.*

*Fifth—The said act of the legislature is void in that it is in conflict with the provisions of the Organic Act providing that the legislature of the Territory "shall not pass any law impairing the right to private property, nor shall any unequal discriminations be made in taxing different kinds of property, but all property subject to taxation shall be taxed in proportion to its value," and the said act is also a discrimination in the taxation of the same kind of property and violates the rule of uniformity in taxation.*

*Sixth—That the said act of the legislature is void in that it is local and special legislation, and in violation of the provisions of section one of the Act of Congress of July 3, 1886.*

*Seventh—That the thirty-five per cent. added to the assessed value of said property by the order of the Territorial Board of Equalization is unauthorized and void.*

## ARGUMENT.

### I.

**Under the Organic Act and the several statutes of the United States, the Legislature of the Territory has no jurisdiction to enact laws—especially tax laws—and put them in force in these Indian Reservations.**



The position of the territories, and their relation to the general government, is one of dependency. They do not possess full powers, even of local self-government, and they are subject to the exclusive jurisdiction and legislation of Congress.

Black's Constitutional Law, p. 19.

*Snow vs. United States*, 18 Wall. p. 319.

*National Bank vs. County of Yankton*, 101 U. S., 133.

In discussing the meaning of the term used in our Organic Act, "that the legislative power of the Territory shall extend to all rightful subjects of legislation," Chief Justice Zane, in *Territory vs. Daniels*, (Utah), 22 Pac. Rep., 160, says:

"When the authority with respect to the subject is specific, and its extent is clearly defined, the discretion of the Legislature within Constitutional limitations cannot be questioned; the denial of such discretion would be a denial of the power of Congress; but when the power is given in general terms, and the extent to which it may be exercised upon the subject is not expressly limited and clearly defined in the Organic Act, then the Territorial Legislature must exercise its discretion. So far as that discretion is expressly limited by the Constitution or the Organic Act such limitation must be observed; but when it is not, the Legislature must follow the dictates of reason and justice. The law must be reasonable and just, because the court will not presume that Congress intended to authorize the Legislature to make an unjust, an unreasonable, an unequal, or an oppressive law. The subjects to which the power of the Territorial Legislature extends are not specifically described, and their number is limited by the word 'rightful.' A law upon a subject not of that number would be held void. In that



case the court would determine that the subject was not within the power of the Legislature; and as to the extent to which the Legislature may act on a rightful subject, when the limit is not expressly fixed, the court must ascertain the limit and determine whether the law is within it."

It is conceded at the outset, that Section one of the Organic Act, in defining the boundaries of Oklahoma Territory, extends the exterior boundary of the Territory around these Indian reservations.

If our inquiry, therefore, should stop at the end of this clause of Section one of the Organic Act, we would be compelled to say that the territory comprising these Indian reservations is a part of Oklahoma for all purposes.

But the defining of the boundaries is not all there is in the Organic Act. Section one also provides:

"That nothing in this Act shall be construed to impair any right now pertaining to any Indians or Indian tribe in said Territory under the laws, agreements and treaties of the United States, or to impair the rights of persons or property pertaining to said Indians."

And that the residents of these Indian reservations were not recognized by the Organic Act as citizens of the Territory is expressly gathered from Section five of the Organic Act, which provides:

"That all male citizens of the United States, above the age of twenty-one years, and all male persons of foreign birth over said age, who shall have, \* \* \* who are actual residents at the time of the passage of this Act of that portion of said Territory which was declared by the proclamation of the President to be opened to settlement, \* \* \* shall be entitled to vote at the first election in the Territory."

The Organic Act provided the means whereby the Territory should be divided into Council and Representative districts, and provided for the election of a Legislative Assembly, and for the election of a Delegate to Congress. The Indian reservations were not included within any of the Council or Representative districts. They were not included in any counties, and since the settlement of Oklahoma they have not been permitted to participate in the Territorial government in any way.

The act provided that there should be seven counties, and fixed the county seats, and under the authority of the act the governor established the boundaries of these counties. The legislature was authorized to change the boundaries of the original counties, but were not given authority to include these Indian reservations, or any lands not then open to settlement, in any of the counties.

The only control over these Indian reservations was delegated to the Supreme Court of the Territory. By section nine of the Organic Act it was provided that the "Territory shall be divided into three judicial districts.

\* \* \* The Supreme Court shall define said judicial districts, \* \* \* and the territory not embraced in organized counties shall be attached, for judicial purposes, to such organized county or counties as the Supreme Court may determine."

Following this authority the Supreme Court, May 29, 1890, made an order attaching the Cherokee Outlet, and the various Indian reservations of the Territory to certain organized counties for judicial purposes, and these Indian reservations, so far as the territory embraced in this litigation is concerned, remained the same

from that time until the opening of the Cherokee Outlet, and the increase of the number of judges of the Supreme Court.

On February 3d, 1894, the Supreme Court entered the following order:

" \* \* \* And it is further ordered that all that portion of the Osage Indian reservation south of the township line between townships twenty-five and twenty-six is hereby attached to "Q" (now Pawnee) County for judicial purposes; and all that portion of the Osage Indian reservation north of said township line, and the Kaw or Kansas Indian reservation, are hereby attached to "K" (now Kay) County, for judicial purposes."

No attempt has ever been made by the territorial legislature to change any of these county boundaries, or to include these Indian reservations within the boundaries of any county, either organized or unorganized; nor has any attempt in any way been made to regulate the judicial districts, or to append any of these Indian reservations to any county for judicial purposes.

All the country opened to settlement since 1889 has been divided into counties by the Secretary of the Interior, by authority of the acts opening such lands to settlement. The Supreme Court of the Territory has exclusively fixed judicial districts, and attached unorganized territory to organized counties for judicial purposes, making such changes as the convenience of the court required.

After the taking effect of the Organic Act every department of government in the Territory, the executive, legislative and judicial, as well as the various departments of the general government, have treated these

Indian reservations as being separate and distinct from the organized portion of the Territory of Oklahoma.

From the time the Organic Act took effect until the decision of the Court below, in this case, crimes committed in these Indian reservations, by white men, have been prosecuted on the United States' side of the Court, as violations of the Statutes of the United States, the United States paying the expenses of such prosecution, and since the handing down of the decision by Justice Tarsney, in the Court below, four of the five districts in the Territory have continued to enforce the same rule. Justice Tarsney alone, since the rendering of said decision, in his district, has enforced in the Indian reservations, the criminal laws of the Territory against white men who have committed crimes in the Indian reservations. In the judicial districts to which these Indian reservations are attached for judicial purposes, all white men who have committed crimes within the territory embraced in this litigation, have been prosecuted on the United States' side of the Court, and at the expense of the United States.

It is true, also, that Indians who have committed crimes on these Indian reservations have been prosecuted for violations of the Laws of the Territory, under the Act of March 3, 1885, 23 U. S. Stats. at Large, p. 385, the United States, however, paying all the expenses of such prosecutions, under the provisions of Section 11 of the Act of March 2, 1889, 25 U. S. Stats. at Large, p. 1004.

Is it possible that all the departments of government that have had to deal with the conditions in these Indian

reservations have been laboring under a misapprehension of the law applicable to these Indian reservations? Is it possible that in the prosecution of these crimes that have been committed in these Indian reservations by white men the courts of this Territory and the various departments of the government and the law officers of the government of the United States, have been laboring under an hallucination, and have been exercising a jurisdiction and depriving the citizens of their liberty, without any law behind them or lawful authority for the arrest and conviction of the perpetrators of such crimes?

The power to legislate, delegated to the Territorial Legislature, includes only "rightful" subjects of legislation. Under this delegation of power could the legislature organize counties in these Indian reservations and set up county governments, establish municipal corporations, townships, school districts and the like, and provide for the maintenance of such municipal corporations by taxation? Would such exercise of power by the Territorial Legislature be in harmony with the control over the Indian country exercised by Act of Congress and by a course of dealing with the Indian tribes as old as the government itself? If it, the Legislature, could not erect organized counties in these Indian reservations, and other municipalities, townships, school districts, road districts and the like, where does it obtain the power to tax them for the benefit of other counties, school districts, townships and the like? And wherein is the power delegated to tax the residents of these Indian reservations, who must reside there if they reside in the Indian

reservations at all, under the sanction and authority of the general government.

The owners of the property in question are not trespassers. They are not setting up against this tax the fact that they are trespassers, or are violating any of the duties and obligations of the government to the Indian tribes. They are there under authority of an Act of Congress, which authorizes these Indian tribes to lease these lands for grazing purposes.

The residents of these Indian reservations have so far received no protection from the laws of the Territory. They have no voice in the election of the legislature to make the laws by which they shall be governed. They have no school facilities for their children. They cannot organize towns and have the benefit of the police and sanitary laws of the Territory. The officers of Kay County have no authority to expend a dollar of the taxes thus gathered to work the roads in these Indian reservations. The residents of these Indian reservations have no voice in the expenditure of a single dollar of this money. They have no voice in creating the debt for which the sinking fund sought to be levied was created, and never received one dollar of benefit therefrom. They have no voice in the election or selection of the delegate that represents the Territory in the Congress of the United States. It seems plain when we consider the relation of these Indian reservations to the Territory, and the attitude of the Territorial and National government towards them, since the organization of the Territory, that the extending of the exterior boundaries of the Territory around these Indian reservations was done



by Congress for the purposes of the government of the United States only, to the end that a forum might be furnished in which Indians could be prosecuted, and white men, committing crimes on these Indian reservations, could be prosecuted, the expenses of all of which have been borne by the government of the United States.

It may be said that these plaintiffs have invoked the aid of the Courts of the district to which these Indian reservations are attached for judicial purposes, for the purpose of preventing this unlawful exaction, and that that is a measure of protection, for which they ought to pay taxes. The expenses of the civil litigants in the Courts of this Territory are borne by the litigants themselves, and the residents of these Indian reservations obtain no greater right to sue in these Courts, or to be sued in these Courts, than the residents of any other State or Territory. The residents of any State or Territory may come to this Territory and invoke the aid of the Courts to protect his rights, and, if found within this jurisdiction, any non-resident may be sued in the Courts of this Territory.

The limitation "for judicial purposes" expresses the measure of control delegated by Congress to the officers of the Territory over these Indian reservations, and that measure of control was delegated to the Supreme Court of the Territory.

The power vested in the Supreme Court to change these Indian reservations and detach the same at any time "for judicial purposes" from one County and attach them, or any part of them, at any time to any other



organized County for judicial purposes, is the only control that has so far, until the passage of this act, been attempted to be exercised over these Indian reservations, and this control has been recognized from the formation of the Territory, by the executive departments of the United States, by the Courts of the Territory, and by the legislative authority of the Territory as well—the Act in question being a recognition of that construction. Is this control vested in the Supreme Court consistent with the jurisdiction assumed by the Territorial Legislature under the Act in question.

Here is a place where the laws of the United States are supreme, where the general laws of the Territory do not run, where the people are not authorized to participate in the Territorial government, where they have no voice in any county, township, school district or city organization, who, if this tax is gathered, will not receive one farthing of benefit—not one penny of it can be expended in that country for any purpose whatever. Yet the legislature, by the Act in question, attempts to require them to contribute of their substance to pay the expenses of a government in which they have no voice, and under which they receive no protection.

It seems to us that these facts are absolutely inconsistent with the idea that the legislature has any control over property situated in these Indian reservations.

It is true that the processes of the Courts may run there. The processes of the Courts are judicial processes and Congress has authorized the Supreme Court of the Territory to attach these reservations to organized counties for judicial purposes. But judicial process and that

process by which the tax gatherer attempts to enforce contributions are not the same.

The case of the *Board of County Commissioners of Yellowstone County vs. The Northern Pacific Railroad Company*, 25 Pac. Rep., p. 1058, is a case in point as to what is meant by the term "judicial processes."

The Yellowstone river was the boundary line between Custer and Yellowstone Counties in the Territory of Montana. The Northern Pacific Railroad Company constructed its road and obtained a grant four hundred feet wide on the south bank of the Yellowstone river in 1885. The Legislature of Montana passed an Act which attached the right-of-way to the County of Yellowstone for "judicial purposes," Yellowstone County being on the other side of the river.

The officers of Yellowstone County, under that authority, attempted to tax it in Yellowstone County; and the question was whether or not they were lawfully authorized so to do.

DeWitt, Judge, in the opinion, says:

"The only argument for this position that we have discovered is that this territory is attached to Yellowstone County for judicial purposes. What are 'judicial purposes?' Webster's dictionary defines the word 'judicial' as 'pertaining or appropriate to courts of justice, or to a judge thereof; as, judicial power; a judicial mind. Practiced or employed in the administration of justice; as, judicial proceedings. Proceedings from a court of justice; as, a judicial determination; ordered by a court, as a judicial sale.' The Century Dictionary, the most thorough English lexicon of which we have any knowledge, devotes a large space to the definition of the word 'judicial.' Among other things it says: 'Of or belonging

ing to a court of justice; of or pertaining to a judge; pertaining to the administration of justice; proper to a court of law; consisting of or resulting from legal inquiry or judgment, as judicial power or proceedings; a judicial decision, writ, sale or punishment; determinative; giving judgment. Judicial act, an act involving the exercise of judicial power.' This excellent work defines the word 'judicial' in connection with many words and expressions with which it is used and invariably in the sense above indicated. It refers to the sinking fund cases, 99 U. S., 700, in which Justice Field says, (page 761): 'The distinction between a judicial and legislative act is well defined. The one determines what the law is, and what the rights of parties are, with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it. Whenever an act undertakes to determine a question of right or obligation, or of property, as the foundation upon which it proceeds, such act is to that extent a judicial one.' Bouvier's Law Dictionary does not define the adjective 'judicial' separately, but treats of it used in connection with a dozen other words, and the whole tenor of definition is so completely in line with what we have already quoted that it is useless to cite further. We cannot doubt in view of the meaning of the word 'judicial,' that the expression 'judicial purposes,' as used in the statute which we are endeavoring to construe, means purposes of the courts and the administration of justice. Taxation certainly does not pertain to the affairs of courts and the administration of justice. Judicial, legislative and executive affairs are very distinctly separated throughout the whole history and policy of American law and government. Their provinces are well defined, and their boundaries sharply drawn."

See also the various definitions of the word "judicial" standing alone, and in connection with other words, *Black's Law Dictionary*, page 658.

*State ex rel. Dollard, Attorney General, vs. Board of County Commissioners, Hughes County, et al.*, 46 N. W. Rep. 1127.

. In the opinion, Kellam, Judge, says:

"In the construction of the statute and its application to the question now under examination, the immediate point of interest is, what did the legislature mean by the expression 'for judicial purposes?' It must be remembered that when this law was passed the counties named were entirely within an Indian reservation. The jurisdiction of the territorial government over that country was restricted and limited to certain purposes, consistent with the treaty rights of the Indians, but the courts had decided in several cases, notably in *Langford vs. Monteith*, 102 U. S. 145, that judicial process, not affecting Indian rights, might run into and be served upon such a reservation; and in March, 1885, Congress passed a law making Indians charged with certain offenses committed either within or without such reservation, triable in the territorial courts. But where should such offenses be tried? In what counties were they indictable? What particular county should have jurisdiction and be authorized to prosecute any particular offense committed in an unorganized county within the limits of the reservation? These considerations would present reasons why the legislature, in 1887, should deem it advisable and important to place these counties, still within the limits of the reservation, under the judicial jurisdiction of an independent, organized county having magistrates, courts, and a grand jury. That they intended so much by the expression, 'for judicial purposes,' is hardly questionable, but did they mean more? A very cursory examination of the acts of the territorial legislature reveals the fact that they did, from time to time, and in many instances,

attach unorganized counties to organized counties for different purposes—sometimes for judicial, sometimes for revenue, and sometimes for election purposes—and in several instances have strongly discouraged the interpretation that judicial purposes might include election purposes, by specially providing for such attachments for both purposes; and in 1881, by chapter 121, the legislature, presumably not regarding the attachment for judicial purposes as sufficient to cover the case, provided specially that such unorganized attached counties should be also so attached for purposes of registration of deeds, mortgages and other instruments. These repeated acts of the legislature indicate, we think, that they had constantly in mind that unorganized counties might be attached to organized counties for different purposes, as exigency or convenience might suggest, and that attaching for one specified purpose did not include any other purpose. But if this statute is to be construed and its meaning determined by the ordinary rules of construction, then another consideration is important, if not dominant. Among Vattel's Rules for the construction of statutes is this: 'The reason of the law—that is, the motive which led to the making of it—is one of the most certain means of establishing the true sense.' Puffendorf expresses the same thought in one of his rules as follows: 'That which helps us most in the discovery of the true meaning of the law is the reason of it, or the cause which moved the legislature to enact it.' Now, can it be reasonably claimed that in 1887, when the legislature attached Nowlin and Sterling counties to Hughes County for judicial purposes, it also intended to attach such counties for election purposes? As we have before seen, or at least attempted to show, there was a reason for so attaching them for judicial purposes, but what fact or reason could have been then present with the legislature to suggest the importance, or even the propriety, of so attaching

them for election purposes? The entire Indian reservation, of which these counties formed a part, was a segregated territory, in which no person could acquire any political rights, nor had the legislature power to confer any. The legislature well knew it had no political jurisdiction over that country, and that any attempt to actually make Nowlin and Sterling Counties a part of Hughes County for election purposes would be nugatory and void. But it may be urged that the legislature had in contemplation a change in the political status of these counties, contingent upon the extinguishment of the Indian rights therein, and while this thought may be entitled to consideration, we do not think we would be justified in going so far to find a reason or a theory upon which we might hold that the legislature had intended to do what they have not done in terms, when the reason for what they have plainly done is so apparent. But it is further claimed that Section 535, Comp. Laws, read in connection with said Chapter 175, Laws 1887, recognizes and confirms the right of defendant to so establish polling precincts in Nowlin and Sterling Counties. It reads as follows: 'Such portions of the territory not organized into counties as are annexed to any organized county shall, for judicial and other purposes, be deemed to be within the limits and a part of the county to which they are annexed.' Whether this section covers the case now in hand, depends entirely upon whether Nowlin and Sterling Counties were 'annexed' to Hughes County within the meaning of that section. That statute declares that, where an unorganized county is annexed to an organized county, certain consequences shall follow generally and without particular enumeration. It fixes the legal status of such annexed county. It shall be deemed to be a part of the senior county, not only for judicial, but for all other purposes. Such annexation, by the very terms of the law, includes not only judicial purposes but all other purposes. The former is more comprehensive, because it



includes the latter and much besides. That attachment for judicial purposes is not the annexation contemplated by that section, is evident both from the section itself and the very obvious consequences immediately involved if such interpretation were adopted. Impressed with that interpretation, the section would put the legislature in the undesirable position of having deliberately and formally declared that an unorganized county attached to an organized county for judicial purposes, is so attached for judicial purposes, which would be idle and supererogatory. We have no hesitation in holding that the annexation contemplated in said Section 535 is a general annexation, and that the attachment of one county to another for a definite and specified purpose, is not such an annexation. The jurisdiction of the senior county over unorganized territory so attached is derived from, and it must be measured by, the Act making the attachment. If the annexation is general, the jurisdiction is general as declared in said Section 535, but, if attached for a specific purpose, the jurisdiction is and must be limited to that purpose. Any other interpretation would not only violate the most elementary rules of construction, but would hinder and embarrass, if not entirely forestall the legislature in the exercise of its unchallenged power to attach unorganized counties to organized counties for specific and limited purposes only."

Under the Organic Act Congress has left nothing to the Legislature of the Territory. The Legislature of the Territory would certainly not have the power to take away from the Supreme Court the power delegated by Congress to the Supreme Court to attach these Indian reservations to organized counties for judicial purposes, and if the Territorial Legislature should pass an Act extending the county lines around these Indian reservations, or dividing them into unorganized counties, we



might have the residents of these Indian reservations paying tribute to one county for taxation purposes and attending the Courts of another organized county, for judicial purposes. This is certainly inconsistent.

The case of the *United States, ex rel. C. K. Davis vs. John Shank and another*, 15 Minnesota Report, p. 369, and West Publishing Company's edition, p. 302, is an exact adjudication of the question here under discussion and is a question arising under the state law where every presumption is in favor of the jurisdiction of the state legislature and against the jurisdiction of Congress. McMillan, judge, wrote the opinion and the Court holds that the State laws of descents and distribution does not run in an Indian Reservation and that the property of an Indian, although he was also a citizen of the United States, could not be administered under the State law in the county of which such Indian reservation was a part and around which the county lines of the county were actually extended.

In the opinion the Court say:

"The said Court, therefore, having no jurisdiction, it is not for us to look farther. If it were necessary to find a jurisdiction, we might find it in the United States government, which has under the constitution, power to regulate commerce with these Indian tribes, and who although separate nations, are under the protection of the general government, (Story, Const., Section 110, and authorities cited), and the immediate superintendence of its officers and agent, or in the Indian tribe to which the deceased belonged."

We are not unmindful of the decision of this court in *United States vs. Pridgeon*, 153 U. S., p. 48, decided in

this court April 16th, 1894. In that case, however the contemporaneous construction of the various departments of government and the different provisions of the Organic Act do not seem to have been presented to this court or considered, and notwithstanding the decision in that case the courts of the Territory, the officers of the Territory and the officers of the general government have continued to administer the law the same as if that decision had not been rendered.

## II.

**Because said Indian Reservations, under the statutes of the United States, are authorized to be leased by the Osage and Kaw tribes of Indians for grazing purposes, and the taxation of cattle kept and grazed on said Indian Reservations is a direct tax upon the right of the Indian tribes to lease the same, and decreases, to the extent of the tax, the grazable value of the Indian Lands.**

The Osages and Kaws own their lands and hold them as a tribe.

The Osages hold their lands by virtue of several treaties with the United States, and an agreement made with the President of the United States in conformity with such treaties.

Article 16, of the Treaty of Sept. 29, 1865, 14  
U. S. Stat. at Large, p. 690.

Section 12, of the Act of July 15, 1870, 16  
U. S. Stat. at Large, p. 362.

Act of June 5, 1872, 17 U. S. Stat. at Large,  
p. 228.

Section 1 of the Organic Act provides, among other things:

"That nothing in this Act shall be construed to impair any right now pertaining to any Indians or Indian tribe in said Territory, under the laws, agreements and treaties of the United States, or to impair the rights of persons or property pertaining to said Indians."

From the time of its organization it has been a settled policy of the government to protect the Indian tribes in the use and free enjoyment of their property, and general provisions have been inserted in treaties and agreements with the Indians, prohibiting white men, except government employes, from residing among the Indians or trading with them in any way. These lands belong to them, have been paid for with their money, and the tribes are entitled to the use and occupancy thereof. Anything that has a tendency to deprive them of the full use and benefit of their lands, or to fix any servitude thereon, is against the policy of the government and detracts that much from the rights of the Indians themselves. Following out the policy of the government, Congress, by the act of February 28, 1891 (26 U. S. Stat. at Large, p. 794, sec. 3), provided as follows:

"That where lands are occupied by Indians, who have bought and paid for the same, and which lands are not needed for farming or agricultural purposes, and are not desired for individual allotments, the same may be leased by authority of the council speaking for such Indians, for a period not to exceed five years for grazing or ten years for mining purposes in such quantities and upon such terms and conditions as the agent in charge of said

reservation may recommend, subject to the approval of the Secretary of the Interior."

The petition (pp. 9 and 10 of the record) charges that the Kaw and Osage Indian reservations are comprised wholly of lands owned, paid for and occupied by said Indian tribes, and have been leased to these plaintiffs for grazing purposes by the Osage and Kaw Indian tribal governments under the supervision of the agent in charge of said tribes, and with the ratification and approval of the Commissioner of Indian Affairs and of the Secretary of the Interior, for grazing purposes, as provided by said Act of Congress. These plaintiffs have complied with the requirements of the Act. They are not trespassers upon the rights of the Indian in holding these cattle on these Indian reservations for grazing purposes. They could not be there except under authority of the Act of Congress above mentioned. They are there under the sanction and protection of that authority that has to deal with the Indians. The lease money is paid to the Indian tribes themselves, and goes to the tribe as a tribe, and into the national treasury of the tribe. Can the Territorial Legislature, under the provisions of the Organic Act and this Act of Congress, by the enactment of a tax law, interfere with this right granted by Congress to the Indian tribe, to derive a revenue from the use of their lands? So far, when a white man has stepped within the borders of these Indian reservations and committed a crime, he has been construed to have violated no law of the Territory and to have violated only the law of the United States, and the only effort that has been made by any department of government to extend the laws of the Territory into *this*

country is this effort made by the Territorial Legislature to extend into this country the hand of the tax-gatherer.

This property that is sought to be taxed is personalty. It follows the domicile of the owner, and may be taxed at the domicile of the owner, and this petition charges that already the greater portion of this property has responded to the claims of the tax-gatherer in the jurisdiction from whence it came. If the owner of this property should die, it would not descend under the laws of the Territory, but would descend and be distributed according to the laws of the domicile of the owner. Is not the taxation of this property that is brought into these Indian reservations, under the provisions of the act of Congress, for the purpose of grazing upon Indian lands, an additional servitude that decreases the usable value of the lands and impairs the rights of persons and property pertaining to said Indians? Does it not operate to fix the rental value of these lands to the same extent that it would if it were a tax upon the land itself? Does it not, and will it not, decrease to the same extent the income of the tribe from the use of these lands. It goes without saying, and we need not cite authorities to this court, that the legislature would have no power to tax these Indian lands; or, for that matter, that the legislature of Oklahoma has no power to tax the personal property of the Indians. How can it do indirectly what it cannot do directly? Has the Legislature of Oklahoma the power to place upon these Indian tribes this additional servitude and take this money out of the treasury of the tribes, under the guise of a tax on the cattle that graze on these lands, when it amounts to the same thing?

In the case of *Pollock vs. The Farmers' Loan and Trust Co.*, 157 U. S., 429, the fifth and sixth points of the syllabus are as follows:

"A tax on the rents or income of real estate is a direct tax, within the meaning of that term as used in the Constitution of the United States."

"A tax upon the income derived from the interest on bonds issued by a municipal corporation is a tax upon the power of the state and its instrumentalities to borrow money and is consequently repugnant to the Constitution of the United States."

In the opinion at page 555, Mr. Chief Justice Fuller says:

"The contention of the complaint is:

"*First.* That the law in question, in imposing a tax on the income or rents of real estate, imposes a tax upon the real estate itself; and in imposing a tax on the interest or other income of bonds or other personal property held for the purpose of income or ordinarily yielding income, imposes a tax upon the personal estate itself; that such tax is a direct tax, and void because imposed without regard to the rule of apportionment; and that by reason thereof the whole law is invalidated."

And in the opinion, at page 580, *et sequens*, Mr. Justice Fuller says:

"If the constitution had provided that Congress should not levy any tax upon the real estate of any citizen of any state, could it be contended that Congress could put an annual tax for five or any other number of years upon the rent or income of the real estate? And if, as the constitution now reads, no unapportioned tax can be imposed upon real estate, can Congress without apportionment nevertheless impose taxes upon such real estate under the guise of an annual tax upon its rents or income? \* \* \* \* \*



"The requirement of the Constitution is that no direct tax shall be laid otherwise than by apportionment—the prohibition is not against direct taxes on land, from which the implication is sought to be drawn that indirect taxes on land would be constitutional, but it is against all direct taxes—and it is admitted that a tax on real estate is a direct tax. Unless, therefore, a tax upon rents or income issuing out of lands, is intrinsically so different from a tax on the land itself that it belongs to a wholly different class of taxes, such taxes must be regarded as falling within the same category as a tax on real estate *eo nomine*. The name of the tax is unimportant. The real question is, is there any basis upon which to rest the contention that real estate belongs to one of the two great classes of taxes, and the rent or income which is the incident of its ownership belongs to the other? We are unable to perceive any ground for the alleged distinction. An annul tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rental or income. This law taxes the income received from land and the growth or produce of the land. Mr. Justice Patterson observed in *Hylton's case*, 'land, independently of its produce, is of no value;' and certainly had no thought that direct taxes were confined to unproductive land.

"If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution, or of the rule of taxation and representation, so carefully recognized and guarded in favor of the citizens of each state. But constitutional provisions cannot be thus evaded. It is the substance and not the form which controls, as has indeed been established by repeated decisions of this Court. Thus in *Brown vs. Maryland*, 12 Wheat., 419, 444, it was held that the tax on the occupation of an importer was the same as a tax on the



imports and therefore void. And Chief Justice Marshall said: 'It is impossible to conceal from ourselves that this is varying the form, without varying the substance. It is treating a prohibition which is general as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself.'

In the same case on rehearing; 158 U. S. 601, the fourth and fifth points of the syllabus are as follows:

"Taxes on real estate being indisputably direct taxes, taxes on the rents or income of real estate are equally direct taxes."

"Taxes on personal property; or on the income of personal property, are, likewise, direct taxes."

And in the opinion, after a reargument of the whole matter, and a full discussion of the subject, the Chief Justice summed up his conclusions as follows:

"Our conclusions may, therefore, be summed up as follows;

"*First.* We adhere to the opinion already announced, that a tax on real estate being undisputably direct taxation, taxes on rents or income of real estate are equally direct taxation.

"*Second.* We are of opinion that taxes on personal property, or on the income of personal property, are likewise direct taxation."

From the above case it is clearly illustrated that a tax on the rents or income of real estate is a direct tax. We do not think it is necessary, in order to determine the tax herein sought to be levied to be illegal, that it should be held to be a direct tax.

If it is a tax at all, even an indirect tax, upon the income of the Indians from the use of their lands under

authority of the Congress of the United States, it is certainly not within the power of the Territorial legislature,

### III.

**The said Act of the Legislature is Unconstitutional and void in that it confers upon the Supreme Court of the Territory of the right to fix taxing districts, which is a Legislative Function.**

Section four of the Organic Act provides: "That the legislative power and authority of the Territory shall be vested in the Governor and Legislative Assembly."

Section six of the Organic Act provides that "The legislative power of the Territory shall extend to all rightful subjects of legislation." No one denies but what the subject of taxation, within the proper limits, and exercised in conformity with the provisions of the law, is a rightful subject of legislation.

Cooley, in his work on Taxation, second edition, page 149, says:

"The power to determine what shall be the taxing district for any particular burden is purely a legislative power."

Under the title of "Constitutional Law", in Volume 3, of The American & English Encyclopedia of Law, it is declared:

"It is an established principle of constitutional law that the power conferred upon the legislature to enact laws cannot be delegated by that department to any other body or authority."

Mr. Cooley in his work on Constitutional Limitations, at page 137, says:

"One of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust."

Again, Mr. Cooley, in his work on Taxation, second Edition, p. 61, says:

"It is a general rule of constitutional law that a sovereign power conferred by the people upon any one branch or department of the government is not to be delegated by that branch or department to any other. This is a principle which prevades our whole political system, and, when properly understood, admits of no exception. And it is applicable with peculiar force to the case of taxation. The power to tax is a legislative power."

In *State, ex rel. Munday, vs. Assessors of the City of Rahway*, 43 N. J. Law, p. 339, the fifth and sixth points of the syllabus are as follows.

"The supplement to 'An Act for the better regulation of proceedings upon writs of *mandamus*,' approved March 3, 1880 (*Pamph. L.* 1880, p. 102), requires the court, before issuing such writs to compel the levy of a tax for the payment of municipal debts, to determine the highest rate of taxation capable of being imposed on the municipality without injury to the interests of the creditors of the

corporation whose claims are not yet due, and forbids the court to direct the levying of any more than the rate will produce. Before the passage of this statute the relator was a creditor of the City of Rahway, the authorities of which had ample power to levy taxes to pay his debt. *Held*, That the enforcement of the law would deprive him of his constitutional remedy, and hence, as to him, the statute was invalid.

"This statute is unconstitutional, also, because it aims to devolve upon the judicial department of the government an exclusively legislative function pertaining to the taxing power—the duty of determining the highest rate of taxation which can be borne by a municipality without injury to its creditors at large."

In the opinion, at page 348, Dixon, Judge, says:

"Courts can determine whether constitutional or legislative restraints and rules as to taxation have been observed, and whether any individual is called upon to pay more than his due proportion, and can compel subordinate legislative bodies to exercise the powers conferred upon them for purposes of taxation, but never has it been held that they could either assume or control the legislative function of deciding what sums the public interests require or permit to be raised."

As bearing upon this question also see the following authorities:

*C. W. & Z. Railroad Co., vs. Commissioners of Clinton County*, 1 Ohio State p. 77.

*The Auditor vs. Holland etc.*, 14 W. P. D. Bush (Ky.) 147.

*Brown vs. Fleischner*, 4 Or. 132.

*State ex rel. Luley vs. Simons*, 32 Minn. 540.

*Ex Parte Wall*, 48 Cal., 279.

*Lamb et al. vs. State*, 11 Ind., 484.

*Maize vs. The State*, 4 Ind., 342.

- Parker vs. Commonwealth*, 6 Pa. St., 507.  
*People vs. Stout*, 23 Barb. (N. Y.), 349.  
*Bradley vs. Baxter*, 15 Barb. (N. Y.), 122.  
*Bartoe vs. Himrod*, 8 New York, 483.  
*Stat. vs. Hudson County Avenue Commissioners*, 37 N. J. Law, 12.  
*People vs. Collins*, 3 Mich. 343.  
*O'Neil vs. American Fire Ins. Co.*, 166 Pa. St.,  
 72; same case 30 Atl. Rep. 943.  
*Anderson vs. Manchester Assurance Co.*,  
 (Minn.) 63 N. W. Rep. 241.  
*Doherty vs. Ransom County*, (N. D.) 63 N. W.  
 Rep. 148.  
*Parks vs. Board of Com'rs Wyandotte Co.*,  
 61 Fed. Rep., 436.  
*Board of Com'rs Wyandotte County vs. Abbott*,  
 (Kan.) 34 Pac. Rep., 416.  
*Dougherty vs. Austin*, (Cal.) 29 Pac. Rep., 1092.  
*People vs. Johnson*, (Cal.) 31 Pac. Rep. 611.

In fact there seems to be no conflict in the authorities upon the proposition that the legislature cannot delegate its functions to any other authority, and the question in the case at bar is whether, by the Act in question, the legislature has delegated its functions to the Supreme Court of the Territory.

The Supreme Court of the Territory is authorized to define the judicial districts, and to attach to organized counties any unorganized country, district or reservation, for judicial purposes. This authority is conferred upon the Supreme Court by the Organic Act and is clearly within the power of Congress; in fact, Congress might have vested in the Supreme Court of the Territory

legislative functions and entirely done away with the legislative assembly. But it did not see fit to do this.

The Act by which this property is sought to be taxed is Article 6, of Chapter 43, of the Session Laws of 1895, at page 232, and Section 1 provides:

"That when any cattle are kept or grazed or any other personal property is situated in any unorganized country, district or reservation of this Territory, then such property shall be subject to taxation in the organized county to which said country, district or reservation is attached for judicial purposes."

Judge Tarsney, in his opinion (record, p. 36), meets this question as follows:

"Another contention of the plaintiffs is that this taxation is unconstitutional and void because it rests upon the attempt of the Supreme Court or the Territory to fix taxing districts, which is a legislative function. The answer to this proposition is that the Supreme Court of the Territory has not attempted to fix any taxing districts; that that Court, under the powers expressly invested in it by the Organic Act of the Territory, in 1894 attached this reservation and unorganized country to Kay County for judicial purposes, and not for the purpose of taxation; that the taxing districts in which these taxes were imposed and levied *was* created and fixed, *not* by the Supreme Court, but by the legislature in the act of 1895, the language of the act being:

"'That when any cattle are kept or grazed,' etc. \*  
\* \* It was by this act that a taxing district was created, and not by the order of the Court.'"

It was not contended in the argument of this case on its presentation to the Supreme Court of the Territory that the Supreme Court of the Territory had fixed this taxing district, *but it was contended* that the act vested



in the Supreme Court the power to fix taxing districts, and that, in the exercise of its power, conferred by the Organic Act, to attach any unorganized country, district or reservation to an organized county for judicial purposes, which it had the right to do at any time, it would thereby in the future fix taxing districts, and that the taxing districts followed, under this act, in the future, any order that might be made by the Supreme Court of the Territory in changing the boundaries of judicial districts. And this has been exemplified by the Supreme Court of the Territory, and we now have an object lesson. July 30, 1897, at its June session, the Supreme Court of the Territory made the following order, which has been duly entered of record:

"It is further ordered that the Osage and Kansas reservations are hereby attached to Pawnee County, Oklahoma Territory, for judicial purposes, and such reservations are declared to be a part of the Fourth Judicial District of the Territory of Oklahoma."

Every step for the taxation of property in that part of the Indian reservations north of the township line dividing townships twenty-five and twenty-six, being that part attached to Kay county at the time this suit was instituted, has been taken this year and all that territory included within this litigation has been taken by this order of July 30th, and attached to Pawnee County. Now, where, may we ask, are the taxes for the year 1897 to be paid?

The statute was not made for the year 1895; it is an enduring statute, and continues until it is repealed by the Legislative Assembly. And the Supreme Court will continue from time to time to change the jurisdiction in these reservations, by taking from one organized county



and attaching to another, as the convenience of the Court may require. And when it does this, under the Act in question, it exercises the legislative function of fixing taxing districts, and thereby the legislature has abdicated its powers and delegated to the Supreme Court the right to fix taxing districts. This is not a case of the delegation of necessary powers to municipal corporations, city councils and the like. It is not the making of an Act to take effect upon the happening of some contingency which is complete in and of itself; but it permits the Supreme Court, by its orders, to pass the necessary legislation to fix the taxing districts so far as these Indian reservations are concerned. And within every authority that we have been able to find it is a delegation of legislative power to the Supreme Court of the Territory, by the Legislature of this Territory; and, if it is a delegation of legislative power to the Supreme Court of the Territory, it renders such legislation void.

#### IV.

**Because the Act of the Legislature of the Territory under which these taxes are sought to be levied is void for the reason that it attempts to tax property situated in said Indian reservations for the benefit of the counties to which they are attached for judicial purposes, the owners and holders of the property on these Indian reservations having no interest in the taxes gathered by either of said counties or by the Territory; no voice**

in their expenditure, and the said Indian reservations not being within the geographical boundaries of either of said counties, and the taxing of the holders of said property by the counties of the Territory is taking the property of persons holding property on said Indian reservations for the benefit of the residents of said counties and is taking private property for private purposes.

The Act of the Territorial Legislature does not attempt to make any part of these Indian reservations a part of the organized counties. It simply provides that "cattle kept or grazed, and any other personal property situated in any unorganized country, district or reservation, shall be subject to taxation in the county to which such country, district or reservation is attached for judicial purposes."

It is an arbitrary declaration that "cattle kept or grazed, and any other personal property" situated in one jurisdiction shall be taxed in another.

The Supreme Court of the Territory, being divided in opinion, *held*, that all the taxes levied under the Act by the county authorities, except for the purpose of court expenses, were invalid, and that the taxes levied for court expenses, and the Territorial levies, were valid.

Inasmuch as the whole case is here by appeal and cross appeal, we will treat the question in this brief in its entirety.

Under the Act the taxes are assessed for the benefit of the organized county. The levies are made by its

officers. The money collected by them is expended for the benefit of the organized county.

Five mills to pay the salaries of the officers who perform no services for the residents of these Indian reservations, in whose election they have no voice, and to whom these officers are not in any way responsible.

For contingent fund, three mills to pay the contingent expenses of the organized county, of which these Indian reservations form no part, and in the expenditure of which the owners the property sought to be taxed in this litigation do not participate.

For a sinking fund, one and one-half mills. Certainly the owners of this property, and the residents in these Indian reservations did not assist in creating the debt for the payment of which this sinking fund is provided. They have received no benefit from it. Not a dollar of it was occasioned by them or in their interest, and if the the inhabitants of these Indian reservations may be made to contribute to this sinking fund, why may they not be required to pay all or any portion of the debts created by the organized County?

For County supplies, three mills. Who uses these supplies? None of the supplies are distributed to the residents of these Indian reservations.

For road and bridge fund, two mills. What voice have the residents of these Indian reservations in the expenditure of this fund? What right have the officers of the organized County of Kay to expend this fund in these Indian reservations? The jurisdiction of the officers of Kay County does not extend beyond the limits of the organized County. It was urged at the trial that

the residents of these Indian reservations, when they come into Kay County, travel upon these highways. If they do, we would suggest that they enjoy them in common with the rest of mankind who live in other States and Territories of the Union. And it might be suggested that if the inhabitants of the organized County of Kay travel in these Indian reservations, they travel the highways that are kept in repair by the voluntary contributions of the residents of these reservations.

For County poor fund, one mill on the dollar, which is equally without benefit to the residents of these Indian reservations. The poor, if any there be in these Indian reservations, are not cared for by the authorities of Kay County.

For county school fund, three mills on the dollar. This fund, when gathered under the law of the Territory, is distributed to the various school districts of the organized county, according to the number of children in the district of school age. The county officers of Kay County have no authority to distribute any portion of this fund to the support of schools in these Indian reservations, and no authority to establish such schools therein.

For court expenses, two and one-half mills on the dollar. And herein is the stumbling block to the Court below.

Because parties *found* on these Indian reservations may enjoy the luxury of being sued in these Courts, the Court below held they should bear the burden of Court expenses for Kay County.

Under the construction given by the various departments of government, and the Courts of the Territory,

crimes committed by white men in these Indian reservations are violations of the laws of the United States, and prosecuted by and at the expense of the United States. Certain specified crimes committed by Indians may be prosecuted on the Territorial side of the Court, but the United States pays the expenses. In civil cases the fees are paid by the litigants. The owners of this property are not protected by the laws of Oklahoma as the residents of the organized counties are, and outside of the luxury of being *found* so that they may be sued they receive the same benefit, and only the same benefit, that citizens of other States and Territories, receive, and not so much benefit as is received by the organized counties of the Territory that have no Indian reservations attached; and there would be as much reason in requiring Logan County to contribute to the payment of the Court expenses of Kay county as to require the residents of these reservations to contribute thereto.

The fact is that the courts of any country are open to all comers, as the highways are open to all travelers, and if the residents of these reservations receive any protection from these courts, they receive it under the Organic Act, and not under any law of the Territory.

Authorities heretofore cited.

All of the reasons urged against these county taxes apply with equal force to the taxes for territorial purposes.

The facts present a plain case of taxation without benefit. The legislature might just as well have said that, for the purpose of helping out the residents of Kay County, a special assessor should be appointed to make

an assessment upon the residents of Logan County, and require them to contribute to the public institutions of Kay County. Why not? The residents of Logan County are as much within the jurisdiction of the officers of Kay County as are the residents of these Indian reservations. They have just as much voice in the election of the officers who have charge of the municipal affairs of Kay County as do the residents of these Indian reservations. They receive just as much benefit therefrom, and more, because they receive the protection of the laws of the Territory.

It is urged that taxation is a question of legislative discretion, and that the courts cannot interfere with that discretion, and Justice Tarsney, in his opinion, expressing his own view, says (record, p. 32):

"If such discretionary power be threatened with abuse, security must be found in the responsibility of the legislature that imposes the tax to the constituency that elected them. The judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons or with regard to property, but if it do not clearly violate some established rule of limitation, the responsibility of the legislature is not to the courts, but to the people by whom its members were elected."

If the Courts cannot curb the legislative discretion—if they have the right by legislation to tax whom they will, when they will, and where they will—then an Act requiring the residents of Logan County to contribute to the support of Kay County would be a valid exercise of power.

It is true that many cases may be found in the books



in which the broad declaration is made that taxation is a matter of legislative discretion. But such declaration cannot be found in any case where the facts are parallel to the facts in the case at bar. Such declaration can only be found in cases where every element of jurisdiction is complete, where the person whose property is taxed enjoys the equal protection of the laws with any other person whose property is subject to like taxation, and who receives substantially the same benefit.

The legislature cannot place upon the property of a County alone a burden which belongs to the State. It cannot place upon one County the burden which belongs to another, nor can it require the entire property of the State to bear a burden that properly belongs to one of its subdivisions. This principle applies with the same force to subjects of general taxation as it does to matters of local improvements.

Mr. Cooley, in his work on Taxation, Second Edition, p. 140, says:

"Taxes are collected as *proportionate* contributions to public purposes. But to make them such in any true sense, they must not only be such as between the persons called upon to pay them, but also as between those who *ought* to pay them. It is therefore of prime necessity in taxation that it should first be determined what public—whether State or local—should bear the burden, and that it should then be imposed ratably as between those who constitute that public. If a single township were to be required to levy upon its inhabitants and collect and pay over to the State whatever moneys were necessary to pay the salaries of the several State officers, it would be apparent, 'at first blush,' that the enactment was not one which, either in its purpose or tendency, was calculated to make the tax payers of that township contribute only



their several proportions to the public purpose for which the tax was to be levied. If, on the other hand, for the purpose of purchasing and ornamenting a city park or any other improvement of mere local convenience, a tax should be imposed upon the whole State, it would be equally manifest that equality and justice were not the purpose of the imposition, but that, if carried into effect, the people of the State not residing in the city would be compelled to contribute to a purpose in which, in a legal sense, they had no interest whatever."

Mr. Chief Justice Bigelow, in *Dorgan vs. The City of Boston*, 94 Mass., p. 237, says:

"In requiring that taxes should be proportional and reasonable, the framers of the Constitution intended to erect a barrier against an arbitrary, unjust, unequal or oppressive exercise of the power. *Oliver vs. Washington Mills* 11 Allen, 268. If, for instance, the legislature should arbitrarily designate a certain class of persons on whom to impose a tax, either for general purposes or for a local object of a public nature, without any reference to any rule of proportion whatever, having no regard to the share of public charges which each ought to pay relatively to that borne by all others, or to any supposed peculiar benefit or profit which would accrue to those made subject to the tax which would not inure to others, so that in effect the burden would fall on those who had been selected only for the reason that they might be made subject to the tax, we cannot doubt that the imposition of it would be an unlawful exercise of power, not warranted by the Constitution, against the exercise of which a person aggrieved might sue for protection."

And Mr. Cooley, at page 141, after quoting the above extract from the opinion of Chief Justice Bigelow, says

"And it is no more incompetent to select classes of

persons for exceptional burdens than it is to select districts of the state for that purpose.

"The cases suggested are extreme cases, but the principle that controls them is universal, and a disregard of it is fatal to the tax; and whether the unjust consequences are slight or serious is unimportant. Where the principles of taxation are disregarded, everyone is entitled to claim strict legal right; for in no other way can the power be restrained from perversion and oppression. \* \* \* \* \*

"To any extent that one man is compelled to pay in order to relieve others of a public burden properly resting upon them, his property is taken for private purposes, as plainly and as palpably as it would be if appropriated to the payment of the debts or the discharge of obligations which the person thus relieved by his payments might owe to private parties. 'By taxation,' it is said in a leading case, 'is meant a certain mode of raising revenue for a public purpose in which the community that pays it has an interest. An act of the legislature authorizing contributions to be levied for a mere private purpose, or for a purpose which, though it be public, is one in which the people from whom they are exacted have no interest, would not be a law, but a sentence commanding the periodical payment of certain sums by one portion or class of people to another.' This principle has met with universal acceptance and approval because it is as sound in morals as it is in law."

Again, at page 144, Mr. Cooley says:

"In cases where the character of the work, as local or general, is plain, the rule of right is clear. If a single locality were to assume to tax itself, or the state were to undertake to tax it, for the construction of a state work or the erection of a state building, no one could hesitate for a moment in saying there was no such right, and that there could be none so long as taxation by the funda-

mental law is required to be laid by fixed rules, and is not subject to the arbitrary caprice of legislative bodies. A county has therefore no Constitutional authority to lay a tax for a county building on a part of its towns only; neither has it authority, when it has contracted a debt for a county purpose, to levy a tax for the satisfaction of the debt on such part of the towns only as its governing board may think ought in equity to pay it."

In *Hammett vs. Philadelphia*, 65 Pa. St., p. 151, it is said:

"There is, indeed, no clause in the Constitution of Pennsylvania which restricts the power of taxation in the legislature as is to be found in the constitutions of many of our sister states. Yet it must be confessed that there are necessary limits to it in the very nature of the subject. It is very clear that the taxing power cannot be used in violation of the provisions of the Bill of Rights, everything in which is 'excepted out of the general powers of the government, and shall forever remain inviolate.' There is no case to be found in this state, nor, as I believe after a very thorough research, in any other—with limitations in the Constitution or without them—in which it has been held that the legislature, by virtue merely of its general powers, can levy, or authorize a municipality to levy, a local tax for general purposes. I shall have a word to say presently of two or three of our cases which are supposed to countenance such an idea. It may be shown logically, and that without difficulty, that such a doctrine lands us in this absurd proposition: That the whole expenses of government, general and local, may be laid upon the shoulders of one man, if one could be found able to bear such a burden. A conclusion so monstrous shows that the premises must be wrong. Such a measure would not be taxation, but confiscation."

Again, at page 153:

"In truth it matters not whether an assessment upon an individual or a class of individuals for a general, and not a mere local purpose, be regarded as an act of confiscation—a judicial sentence or rescript, or a taking of private property for public purposes without compensation—in any aspect, it transcends the power of the legislature, and is void. I regard it as a forced contribution. If the sovereign breaks open the strong box of an individual or corporation and takes out money, or, if not being paid on demand, he seizes and sells the lands or goods of the subject, it looks to me very much like a direct taking of private property for public use. It certainly cannot alter the case to call it taxation. Whenever a local assessment upon an individual is not grounded upon, and measured by, the extent of his particular benefit, it is, *pro tanto*, a taking of his private property for public use without any provision for compensation."

The opinion in this case is extensive, and a very instructive one upon the questions involved.

Mr. Chief Justice Robertson, in *Lexington vs. McQuillan's Heirs*, 9 Dana (Ky.), at page 516, says:

"An exact equalization of the burden of taxation, is unattainable and *utopian*. But still there are well defined limits, within which the practical equality of the constitution may be preserved, and which, therefore, should be deemed impassable barriers to legislative power. Taxation may not be universal; but it must be general and uniform. Thus, if a capitation tax be laid, none of the class of persons thus taxed can be constitutionally exempt upon any other ground than that of public service; and, if a tax be laid on land, no appropriation land within the limits of the State can be constitutionally exempted, unless the owner be entitled to such immunity in consequence of public service. The legislature, in the

plentitude of its taxing power, can not have constitutional authority to exact from one citizen, or even one County, the entire revenue for the whole commonwealth.

"Such an exaction, by whatever name the legislature might choose to call it, would not be a tax, but would be undoubtedly the taking of private property for public use, and which could not be done constitutionally, without the consent of the owner or owners, or without retribution of the value in money.

"The distinction between constitutional taxation, and the taking of private property for public use by legislative will, may not be definable with perfect precision. But we are clearly of the opinion that, whenever the property of a citizen shall be taken from him by the sovereign will, and appropriated, without his consent, to the benefit of the public, the exaction should not be considered as a tax, unless similar contributions be made by that public itself, or shall be exacted rather by the same public will, from such constituent members of the same community generally, as own the same kind of property. Taxation and representation go together. And representative responsibility is one of the chief conservative principles of our form of government.

"When taxes are levied, therefore, they must be imposed on the public in whose name and for whose benefit they are required, and to whom those who impose them are responsible. And although there may be a discrimination in the subjects of taxation, still persons in the same class, and property of the same kind, must generally be subjected alike to the same common burden."

In the case of *Sharpless vs. The Mayor of Philadelphia*, 21 Pa. St., p. 174, Black, Chief Justice, in summoning up the case, among other things, says :

"By taxation is meant a certain mode of raising revenue for a public purpose in which the community that

pays it has an interest. The right of the State to lay taxes has no greater extent than this.

"An Act of the legislature authorizing contributions to be levied for a mere private purpose, or for a purpose which, though it be public, is one in which the people from whom they are exacted have no interest, would not be a law, but a sentence commanding the periodical payment of a certain sum by one portion or class of people to another. The power to make such order is not legislative, but judicial, and was not given to the assembly by the general grant of legislative authority."

In the case of *Washington Avenue*, 69 Pa. St. Agnew, Judge, in the opinion at page 361, *et seq.*, says:

"To apply it to the country and to farm-lands would lead to such inequality and injustice as to deprive it of all soundness as a rule, or as a substitute for a fair and impartial valuation of benefits in pursuance of law; so that at the very first blush, every one would pronounce it to be palpably unreasonable and unjust. Judged of by this rule for deciding in a question of constitutional power, the law in this case cannot stand. \* \* \* \*

"I admit that the power to tax is unbounded by any express limit in the Constitution, that it may be exercised to the full extent of the public exigency. I concede that it differs from the power of eminent domain, and has no thought of compensation by way of a return for that which it takes and applies to the public good, further that all derive benefit from the purpose to which it is applied. But nevertheless taxation is bounded in its exercise by its own nature, essential characteristics and purpose. It must therefore visit all alike in a reasonably practicable way of which the legislature may judge, but within the just limits of what is taxation. Like the rain it may fall upon people in districts and by turns, but still it must be public in its purpose, and reasonably



just and equal in its distribution, and cannot sacrifice individual right by a palpably unjust exaction. To do so is confiscation, not taxation; extortion, not assessment, and falls within the clearly implied restriction in the Bill of Rights."

In the case of *Taylor McBean & Co. vs. William R. Chandler, et al.*, 9 Heiskall, 349, the Court in the syllabus fully states the law as laid down in the opinion, and the opinion ably supports the doctrine laid down in the syllabus.

The syllabus of the case is as follows:

"1. *Principia.* The power to impose and collect taxes is essential to governmental organization; and is inherent in American governments, state and federal, with written constitutions in which powers are created and defined, and duties disposed and distributed among the several departments in their various functions. To discharge the charges incident to the exercise of the powers and the performance of the duties prescribed in the Constitution of Tennessee, the power of taxation is assigned to the Legislative department. In the employment of this power the Legislature must be restrained by the regulations imposed in the Constitution, and it devolves upon the Judiciary to determine whether it has exceeded these limitations. Taxation is a mode of raising revenues for public purpose only, and must be laid according to some rule of apportionment. Equality is of the essence of the power; therefore, a State burden cannot be placed upon any territory less than the entire State, nor a County burden upon territory greater or smaller than the County. If the tax be laid upon one of the municipal subdivisions of the State alone, its purpose must not only be public, as regards the people of that municipality, but also local. These principles are fundamental, and inherent as conditions in the power to



impose every burden which taxation is to provide—and, only when they are observed, does the Legislature exercise legitimate authority.”

In *Mayor and City Council of Baltimore vs. Hughes, Administrator*, D. B. N., 1 Gill & J., p. 491, Buchanan, Chief Justice, discusses the question here under consideration as follows:

“A recovery by the plaintiffs of the taxes imposed under the 13th section of the ordinance of the 9th of March, 1807, is resisted by the defendants on two grounds:

“*First*. That the power given by the ordinance has not been well executed.

“*Second*. That the ordinance itself is not authorized by the charter.

“The second ground relied upon involves the construction both of charter and the ordinance, and will be first examined. \* \* \*

“But where an ordinance provides for the paving of a street, etc., in a particular district, and the imposition of a special tax for that purpose on such district, which paving appears to be, by the ordinance, for the general benefit of the city and not for the benefit of the particular district such an ordinance is not in pursuance of the authority conferred by the charter, and is void.”

*Dyer vs. Farmington Village Corporation*, 70 Me. 522.

*Sutton's Heirs vs. City of Louisville*, 5 Dana (Ky.) p. 528.

Mr. Burroughs, in his work on taxation, section twenty-six, says;

“It is not in the power of the legislature, under the guise of taxation, to give the property of A. to B., or to impose the whole burden of a tax for the State upon one

person or upon one county. Such absolute, arbitrary powers have no place in a government regulated by law.

"In local taxation, there must be some benefit to the people of the locality not common to all the people of the state; if it be for a town or county it must be for a purpose common to the people of the town or county, and of peculiar benefit to them.

In the case of *Ex Parte Marshall*, 64 Ala. 266, the question under consideration is discussed, and the case, so far as it is responsive to the question now under consideration, is as follows:

"1. License tax, as revenue law, or police regulation—A revenue law, imposing a license tax on an occupation or business in an incorporated city or town, for the benefit of the county, or other larger Territorial district in which it is situated, is violative of that equality of taxation which is a fundamental, constitutional principle; but, as a police regulation, the price of such license may be regulated by the populousness of the community in which the privilege is to be exercised, and the profitableness of the business.

"STONE, J.: 'My opinion is, that a rule *nisi* should be awarded in this case. The taxes and assessments, authorized by the act 'To regulate the system of public schools in the county of Mobile,' approved January 16th, 1854, although some of them are laid on occupations usually assessed by license, are, nevertheless, simply taxes for revenue purposes.—Pamph. Acts 1853-4. page 190; Ib. 235. The purpose of each act was to aid in the support of the common schools throughout the whole, the benefits of which are distributed and enjoyed throughout the County. Yet, in the 4th section, subdivision 3, of the first named Act, it is provided: 'The following license taxes shall also be collected by the Judge of Probate of Mobile County, for the use of said Mobile school com-

missioners: \* \* \* To authorize the retailing of spirituous liquors in the City of Mobile, fifty dollars.' This is a clear case of levying a tax from a limited area, the City of Mobile, to be used and disbursed in the maintenance of the common schools over a much larger area, the County of Mobile. And, speaking of the levy of these license taxes, in the Act, approved February 14, 1854, (page 235), the legislature declared 'that the purpose of the Act, in affixing rates of licenses, was not to authorize any of the employments, amusements, games, sports, tables or alleys, but to impose an additional tax thereon.' These extracts show clearly, to my mind, that the purpose of this levy was revenue—revenue for the support of the common school system of Mobile County—and not a police regulation of the traffic in spirituous liquors. We have, then, in the case of the lax levied in one community, for the benefit, not alone for that community, but for the common benefit of that and a much larger community, not similarly taxed. It will not be denied that this extra-license tax, if its purpose simply be revenue, is violative of the fundamental constitutional principle on which the right of taxation rests."

*Cooley on Taxation*, 128-9; *Ib.* 396.

*Burroughs on Taxation*, 68; *Ib.* 392.

*Durack's Appeal*, 62 Penn. St. 491.

*Washington Avenue*, 69 Penn. St., 352.

*Lin Sing vs. Washburn*, 20 Cal., 534.

In *Tidewater Co. vs. Coster*, 18 New Jersey Eq. 518, the fifth point of the syllabus is as follows:

"To compel the owner of property to bear the expense of an improvement except to the extent of his particular advantage, is, *pro tanto*, to take private property for public use without compensation."

In the opinion, at page 526, the Chief Justice says:

"But looking more closely into the structure and effect of this statute, there appears to be a defect which seems to be both radical and incurable, and which must prevent its judicial enforcement. The defect alluded to is this: No provision is made for the indemnification of the owner of the land subjected to the operation of this law, in case the expense of the improvement shall exceed the benefits which shall be conferred. \* \* \*

"Now, therefore, it seems to me obvious, that if this scheme be carried into effect, in the event of an excess of expenses over benefits, private property, *pro tanto* will be taken for public use without compensation."

And, again, at page 531:

"That principle is one of great importance; for if the burthens of the community can be thrown upon a smaller class, whose position is not peculiar or different from that of the rest of the people, there can be no security for private possessions. To permit individuals to be taxed to pay for a public improvement to the extent of the peculiar benefit which they receive from such improvement is not unjust or inequitable; but any exaction beyond this, exclusively from such individuals, is an act which involves the ability, on the part of the community, to confiscate, for its own purposes, the property of the citizen. Such power has not, by the Constitution of this State, been placed in the hands of the legislature; and as the act in question has, in the particular adverted to, exercised such power, it is in my opinion void."

Mr. Desty in his work on Taxation, page 26, says:

"If a tax is laid on a municipal subdivision, the purpose must not only be a public purpose as regards the people, it but must also be local. It is of the essence of taxation that it should compel the discharge of the burden by those upon whom it rests, and an attempt to com-

pel a county to pay a charge properly resting on the whole state would be unconstitutional. Where a public improvement is for the general benefit of the whole city, a tax on the persons and property of a particular district is void. A law which would attempt to make one person, or give a number of persons, under the guise of local assessment, pay a general revenue for the public at large, would not be an exercise of the taxing power, but an act of confiscation."

Mr. Black in his Work on Constitutional Law, page 328, says:

"But it is not consonant with the constitutional idea of a tax that it should be exacted from individuals in an arbitrary or discriminating manner. The idea of taxation implies equality of burdens, and a regular distribution of the expenses of government among those persons, or those classes of property, which are rightly subject to the burden of them. Taxes, properly so called, are distinguished from arbitrary exactions or enforced contributions in this, that taxes must be laid according to some rule which apportions the burden of the tax between the subjects which are to contribute to it. An exaction which is made without regard to any rule of apportionment is not properly a tax, and such an exaction is not within the constitutional power of the government."

Again, on page 329 and 330, Mr. Black says:

"But in this country the taxing power is subject to certain positive limitations, within which its exercise must be confined, in order to answer the requirement of legality. 'Great as is the power of any sovereignty to levy and collect taxes from its citizens, it is not in a constitutional country without limitations which are of a very distinct and positive nature and exist whether declared or not declared in the written Constitution; but some of them it is not uncommon to specify, either out of abundant

caution, or to keep them fresh in the minds of those who administer the government. Some others in this country spring from the peculiar form of the government and the relation of the states to the common authority. Still others are expressly imposed, either by the state Constitution or by that of the Union.' "

And, again, on page 330, Mr. Black says:

"This limitation upon the taxing power is not expressed in the Constitutions, but is to be implied from the nature of our system of government. No political community can in general lay assessments upon any subjects of taxation not within its territorial jurisdiction."

And, again, at page 338, Mr. Black says:

"And so again a tax cannot be imposed exclusively on any subdivision of the State to pay an indebtedness or claim which is not peculiarly the debt of such subdivision, or to raise money for any purpose not peculiarly for the benefit of such subdivision. In other words, if the tax be laid upon one of the municipal subdivisions of the State alone, the purpose must not only be public, as regards the people of that municipality, but also local."

In the case of *Wells vs. The City of Weston*, 22 Mo. 384, the syllabus is as follows:

"The Legislature cannot authorize a municipal corporation to tax, for its own local purposes, lands lying beyond the corporate limits."

In the opinion, at page 388, Leonard, Judge, says:

"It is true, the Legislature possess the uncontrolled power of taxation, with the single limitation that 'all property subject to taxation shall be taxed in proportion to its value;' and this authority to tax, they may undoubtedly delegate to subordinate agencies, such as County tribunals and municipal corporations, to be assessed and applied locally; but here the attempt is to authorize a municipal corporation—charged with the sub-



ordinate government of persons and things within its limits, and having, as incident to this, the power to tax these persons and things for local purposes—to impose a tax upon the lands lying beyond its limits; or, in other words, arbitrarily, under the mask of a tax, to take annually from those who are without its jurisdiction a certain portion of their property lying within a half mile of the corporate limits; which we think can not be done.”

In the case of *Ryerson vs. Utley*, 16 Mich., at page 276, Chief Justice Cooley, in the opinion, succinctly states the law, as follows:

“It is of the essence of all taxation that it should compel the discharge of the burden by those upon whom it rests; and if the State should attempt to compel any single County by taxation to pay the salaries of the State officers, or the expenses of the Legislature, no one would for a moment doubt that while the act was arbitrary, unjust and tyrannical, it was also unconstitutional.”

In the case of *Cheaney vs. Hooser*, 9 B. Monroe (Ky.), p. 341, that part of the opinion responsive to the question under consideration is as follows:

“We come then to the third, and as we consider it the most serious objection, which alleges that the extension of the limits of a town, so as to include the adjacent land within the town, against or without the consent of the owners, and to subject the property and people within the added territory, to the jurisdiction and taxing power of the extended municipal government, without the consent of the added population, is in effect taking private property for public use, without the consent of the owners; and that if done without making or at least securing to them a just compensation, not merely in estimated advantages but in money, it is a violation of the constitutional provision on that subject. There being no express constitutional declaration or prohibition



directly applicable to the power or subject of taxation, and none which in terms secures equality or uniformity in the distribution of public burthens, either general or local there is no clause to which the citizens can with certainty, appeal for protection against an oppressive and ruinous discrimination under color of the taxing power, unless it be that which prohibits the taking of private property for public use, without compensation. The general spirit of equality and the sense of justice which pervade not only the constitution but the community at large, and therefore, presumably, its representatives, would doubtless furnish guarantees ordinarily sufficient to prevent any flagrant departure from substantial equity in the imposition of taxes or other burthens, for the benefit of the State at large. Nothing but extreme excitement bordering on fury, would reconcile even a domineering majority, to an act which should impose on the minority the entire or a flagrantly disproportionate burthen in supporting the government or carrying on its public and general objects. But even this latter result might, to some extent, be indirectly or inadvertently produced with respect to burthens which ought to be general. And there is still more danger of its being done or authorized in those acts of legislation which being entirely local in their character and operation and not apparently calculated to affect injuriously, either persons or property, may attract little attention or interest beyond the immediate locality to which they relate. Such acts affecting local interests only, referring to local circumstances, controlled mainly by the local representation, and therefore, likely to be influenced by the majority of those interested, may, by their operation, not fully explained or comprehended, subject a few individuals or a single one, to burthens for the benefit of those alone who are to impose them, and for purposes in which the parties thus subjected have no such interest as should require contribution from them."

In the case of *State, ex rel., vs. Haben*, 22 Wis. 629, the first point of the syllabus is as follows:

"Money raised in a city, by taxation, for the purpose of erecting a high school building, cannot be diverted by an act of the legislature, without the assent of the city or its inhabitants, to the purchase of a site for a normal school in said city."

Mr. Chief Justice Dixon, in the opinion, at star page 665, says:

"The question then is: Was it competent for the legislature, without the assent of the city or its inhabitants, thus to divert the funds raised and in the hands of the treasurer for the purpose of erecting a suitable high school building, and to declare that they should be appropriated, not for that purpose, but for the purpose of purchasing a site for a State normal school in the city? We are clearly of the opinion that it has not."

In the case of the *County Court of Madison County vs. The People of the State of Illinois*, on the relation of *The Toledo, Wabash & Western Railway Co.*, 58 Ill. 456, a case for *mandamus* to compel the issuance of certain bonds which had been voted to the railway company under the provisions of an act of the legislature providing:

"That if the county authorities shall be of the opinion that the road would be a special advantage to the inhabitants or owners of property in a particular strip, district or section of the county, and not of great advantage to the county at large, they may subscribe such sum as they shall deem proper to the capital stock, or as a contribution in aid of the railway company, and shall issue their bonds therefor as in other cases, which are declared to be valid and binding. And the county authorities are empowered and it is declared to be their duty, to take all

proper steps, to make all necessary rules and regulations for collecting the necessary revenue to pay the principal and interest out of, and upon the inhabitants and property in such strip, district or section, in the same manner as for the county at large." The strip, district or section is required to be specifically designated by the county authorities at the time of making such subscription.

In pursuance of this power the authorities of Madison county made a subscription on behalf of a portion of the county.

In the Supreme Court the *mandamus* was denied, and in the opinion Mr. Justice Walker, at page 462, after holding that the strip so set apart was not a municipal corporation, and that it could not be taxed, goes on to say:

"If, on the other hand it be claimed it is a debt against the county to be paid out of the property of this strip, then it is not uniform in respect to the persons and property of the county, and is repugnant to that section of the Constitution. The power to impose a corporate debt, or tax, on a portion of the persons or property of a corporate body, is expressly prohibited, and this law cannot be sustained under this provision.

"Again, a portion of the citizens, of a county, at an election confined to them, and from which the other citizens are excluded, cannot impose a debt upon the county."

In *Sleight vs. The People*, 74 Ill., page 47, the second point of the syllabus is as follows:

"A tax imposed for the payment of a debt not incurred by the authority imposing the tax, and for the payment of which it is in nowise responsible, is not for a corporate purpose."

Under an Act of the Legislature of Illinois in this case, the claim was made, and the court below held: "That the entire tax collected from the railway company for county and township purposes, in the several towns through which the road runs, should be paid to and set apart by the County Treasurer, as a sinking fund, to be applied *pro rata* in redeeming the principal of the bonds issued by the town of Weller and Galva," in Henry County, and in the opinion, Mr. Justice Scholfield, speaking for the Court, says:

"But the claim here made is for taxes actually levied and collected for county and township purposes, from the railway company, in the towns of Oxford and Clover. If this amount shall be taken, then there must necessarily be a deficiency, to that extent, in the county and township revenues, which will have to be supplied by additional taxation. The property liable to taxation in one municipality will thus be compelled to bear a burden of taxation imposed by the corporate authority of a different municipality, and this, too, without its consent, and in the absence of any presumptive corresponding benefits. The principle upon which alone this can be sustained is, that the legislature may, in its pleasure, impose debts upon counties and townships and require their payment, without regard to the wishes of the inhabitants and taxpayers of such counties and townships; for it is evident that the practical result is precisely the same, whether it is said the taxes levied for county and township purposes on the property of the railway company, in the towns of Oxford and Clover shall be set apart for the payment of the bonds issued by the towns of Weller and Galva, or that the county and these townships shall pay a sum equal to that amount, out of their revenues, for the same purpose. In either event, it is taking so much of the revenues of the county, and the towns of Oxford and

Clover, to pay the debts of the towns of Weller and Galva. But it has been repeatedly held by this Court that the legislature is powerless to impose a debt upon a municipality without its consent; and those cases must be deemed conclusive on the question involved here."

The case of *Morford vs. Unger*, 8 Iowa, p. 82, is a case in which the legislature of the State of Iowa authorized the City of Muscatine to take additional territory within the corporate limits of the city, and we respectfully invite the attention of the Court to the discussion of the subject in this case and to the review of authorities.

In the opinion, at page 94, Stockton, Judge, says:

"The extension of the limits of a city or town, so as to include its actual enlargement, as manifested by houses and population, is to be deemed a legitimate exercise of legislative power. An indefinite or unreasonable extension, so as to embrace lands and farms at a distance from the local government, does not rest upon the same authority. And although it may be a delicate, as well as a difficult, duty for the judiciary to interpose, we have no doubt but that there are limits beyond which the legislative discretion cannot go."

In the case of *In the matter of Lands in the Town of Flatbush*, 60 N. Y. 398, the fourth point of the syllabus is as follows:

"It is not within the legislative authority to compel an adjoining town to be taxed for the payment of debts previously contracted by a city."

In the opinion, at page 406, Miller, Judge, says:

"There is no principle, that I am aware of, which sanctions the doctrine that it is within the taxing power of the legislature to compel one town, city, or locality to contribute to the payment of the debts of another. The

government has no such authority, and this case is entirely without a precedent. If such assessments were authorized they might not be limited to adjoining towns, cities or villages, but applied to those located at great distances from each other. Such legislation would be unjust, mischievous and oppressive, and cannot be tolerated. None of the acts in question, therefore, for the reason last stated, in any sense gave authority to the commissioners to impose the burden of the assessments made upon the town of Flatbush.

In the case of the *City of St. Charles vs. Nolle*, 51 Mo., 122, the syllabus is as follows:

"So much of the ordinance of the City of St. Charles requiring a license tax for wagons used for pay, as attempted to impose a tax upon wagons of outside residents engaged in hauling into and out of the city, was void as not being authorized by the charter of that city, and the legislature could give the city council no authority to pass such an ordinance. The tax being upon outside citizens and for the benefit of those living in the city, would be in effect, taking property for private use; that is, for the use of a particular community of which the outside citizens form no part."

The opinion delivered by Judge Adams is directly responsive to the syllabus and reviews several cases, and is an authority directly in point.

*Bromley, et al., Trustees, vs. Reynolds, et al.*, 2 Utah 525, was a case in which the legislature of Utah passed an Act providing that all the taxes collected upon a railroad running through any school district should be collected and one-half thereof paid to the county treasurer to be distributed to the other school districts in the county.



The tax collector collected the taxes on a railroad running through a school district and paid one-half of the sum to the county treasurer, in accordance with the Act. The trustees of the school district brought suit against the tax collector to recover the amount so paid to the county treasurer on the ground that property in one school district could not be taxed for the benefit of another school district, and in the opinion at page 529, *et seq.*, Emerson, Judge, speaking for the court, says:

"By the provisions of this law, each school district is made a separate taxing district for school purposes in that district. The funds in question were raised by a tax duly levied and assessed by the trustees of Echo school district, for the sole purpose of maintaining schools in that district. The trustees have no power to raise taxes in their respective districts for any other purpose. It is a local tax for a local purpose. Section 19 seeks to divert a portion of that tax or the funds raised therefrom to another purpose, and to distribute them in another taxing district, and is we think on that account invalid. It is in effect requiring the levying of a local tax for a general purpose. The following remarks by Sharswood, J., in *Hammett vs. Philadelphia*, 65 Pa. St. 146, are applicable to this case: 'There is no case to be found in this state, nor, as I believe, after a thorough research, in any other, with limitations in the Constitution, or without them, in which it has been held that the legislature, by virtue merely of its general powers, can levy, or authorize a municipality to levy a local tax for general purposes.'"

In *Bradshaw vs. The City of Omaha*, 1 Neb., 16, the fourth point of the syllabus is as follows:

"The Courts have jurisdiction to inquire and determine whether lands brought by the legislature within the

limits of a city, are justly subjected to taxes levied by it for its support; because that is a question of property and private right."

In the opinion, Chief Justice Mason, says:

"But it is a question of property and private rights, whether such lands should bear a burden or a share of a burden, for another's benefit. And therefore it may be a question for the determination of the Court."

*Langworthy vs. Dubuque*, 13 Ia., 86.

*Fulton vs. City of Davenport*, 17 Ia., 404.

*Buell vs. Ball*, 20 Ia., 262.

*Deeds vs. Sanburn*, 26 Ia., 419.

*Deiman et al. vs. City of Fort Madison*, 30 Ia., 542.

*Holden vs. James*, 11 Mass., 396.

In *Taylor vs. Porter and Ford*, 4 Hill (N. Y.), 140, Bronson, Judge, speaking for the Court, says:

"Under our form of government the legislature is not supreme. It is only one of the organs of that absolute sovereignty which resides in the whole body of the people. Like other departments of the government, it can only exercise such powers as have been delegated to it; and when it steps beyond that boundary, its acts, like those of the most humble magistrate in the State who transcends his jurisdiction, are utterly void. Where, then, shall we find a delegation of power to the legislature to take the property of A. and give it to B., either with or without compensation? Only one clause of the Constitution can be cited in support of the power, and that is the 1st Section of the 1st Article, where the people have declared that, 'The legislative power of this State shall be vested in a Senate and Assembly.'"

*Wilkinson vs. Leland*, 2 Peters 627.

Mr. Chief Justice Story in the opinion at page 657, says :

"In a government professing to guard the great rights of personal liberty and of property, and which is required to legislate insubordination to the general laws of England, it would not lightly be presumed that the great principles of Magna Charta were to be disregarded, or that the estates of its subjects were liable to be taken away without trial, without notice, and without offense. Even if such authority could be deemed to have been confided by the charter to the General Assembly of Rhode Island, as an exercise of transcendental sovereignty before the Revolution, it can scarcely be imagined that that great event could have left the people of that State subjected to its uncontrolled and arbitrary exercise. That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least, no court of justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of Legislative authority, or ought to be implied from any general expressions of the will of the people."

*Fletcher vs. Peck*, 6 Cranch, 87.

Chief Justice Marshall, in the opinion at page 135, says:

"It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where

are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation."

To the Legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public, be in the nature of the legislative power, is well worthy of serious reflection."

*Morse vs. Stocker*, 1 Allen, 150.

In the opinion at page 152 Hoar, Judge, says:

"The power of the Legislature over private property, under the Constitution, is certainly not absolute, and must be exercised under limitations which have been carefully guarded and defined; and it is one of the gravest duties of this Court to determine, in any case presented for its decision, whether those limitations have been exceeded."

Mr. Cooley, in his *Work on Constitutional Limitations*, sixth edition, 598, says:

"Having thus indicated the extent of the taxing power, it is necessary to add that certain elements are essential in all taxation, and that it will not follow as of course, because the power is so vast, that everything which may be done under pretense of its exercise will leave the citizen without redress, even though there be no conflict with express constitutional inhibitions. Everything that may be done under the name of taxation is not necessarily a tax; and it may happen that an oppressive burden imposed by the government, when it comes to be carefully scrutinized, will prove, instead of a tax, to be an unlawful confiscation of property, unwarranted by any principle of constitutional government."

*Loan Association vs. Topeka*, 20 Wall. 655.

Mr. Justice Miller, speaking for the Court, in the opinion at page 663, says:

"The theory of our Governments, State and National, is opposed to the deposit of unlimited power anywhere. The Executive, the Legislative and the Judicial branches of these Governments are all of limited and defined powers."

"There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name."

Mr. Cooley, in his Work on Constitutional Limitations, page 606, says:

"When, therefore, the Legislature assumes to impose a pecuniary burden upon the citizen in the form of a tax, two questions may always be raised: First, whether the purpose of such burden may properly be considered public on any of the grounds above indicated; and second, if public, then whether the burden is one which should properly be borne by the district upon which it is imposed. If either of these questions is answered in the negative, the Legislature must be held to have assumed an authority not conferred in the general grant of Legislative power, and which is therefore unconstitutional and void. 'The power of taxation,' says an eminent writer, 'is a great governmental attribute, with which the Courts have very wisely shown extreme unwillingness to interfere; but if abused, the abuse should share the fate of all other usurpations.'"

*Territory vs. Daniels*, (Utah) 22 Pac. Rep., 159. is also a case in point.

The case of *Ferris vs. Vannier*, 42 N. W. Rep. p. 31, is cited by Justice Tarsney as the only case presented, directly in point, (record page 37) and the attention of

this court is respectfully called to the opinion of Thomas, Judge, in that case. The Supreme Court of Dakota, without division, *held* the county taxes illegal, Tripp, Chief Justice, and the rest of the Judges, except Judge Thomas, holding that the Territorial tax was valid. We submit that the argument made by Judge Thomas is founded in reason, and supported by the authorities.

Judge Tripp, in his opinion, makes a labored argument to show that the legislature is to be the judge of what property is subject to taxation. In effect he argues that when Congress says, "nor shall any unequal discrimination be made in taxing different kinds of property, but all property subject to taxation shall be taxed in proportion to its value," it means that the legislature may provide that real and personal property shall be taxed in one county, and personal property alone may be taxed in another county, and that while there may be in the unorganized county real estate subject to taxation, and real estate in all organized counties of the Territory is taxed, it is not a discrimination in taxing different kinds of property to provide that in an unorganized county only personal property shall be taxed, and, therefore, the law taxing personal property in the unorganized county is a valid law, so far as the territorial taxes are concerned, but admitted that the legislature had no power to require the property situated in an unorganized county to contribute to the local charges for the benefit of the organized county; recognizing thereby all the authorities we have cited under this head of our brief on the subject of taxation without benefit.

There is a difference, too, under the laws of Dakota,



between an unorganized county and an Indian reservation. There, as here, the statute provided that property in one jurisdiction should be subject to taxation in another. It does not appear in that case that the unorganized county referred to was an Indian reservation and controlled by the provisions of an Organic Act, which, as before stated, has been construed by the Courts of the Territory, and all the departments of the government, to be a place under the absolute and exclusive jurisdiction of the United States. Judge Tripp urges that the legislature can make such exemptions as it sees fit.

From all the cases above cited we gather the doctrine that it is beyond the power of the legislature to tax one locality for the benefit of another.

It is held by all these cases that to tax one locality for the benefit of another is the taking of private property for private purposes, or is at least taking private property for public purposes, without compensation, and that it is beyond the power of the legislature to do this, even though there may be no express constitutional provision applicable to the case and to which such power is repugnant.

It is apparent that none of the property sought to be taxed under the Act in question is under the protection of the Territorial laws or within the jurisdiction of the County of Kay, or benefited by Territorial or county, or any other municipal organization.

The cases we have cited fix the limit beyond which the legislature may not go. They all recognize the doctrine that the legislature is vested with a large discretion in a proper case, which we concede—one that is neces-

sary in carrying out the purposes of the government—but as has been said in all these cases, when the legislature oversteps the boundary line and takes the property of one locality for the benefit of another, it ceases to be legislation and becomes a legislative decree, confiscating the property of one individual, for the benefit of another individual, or for the benefit of another community.

The dividing line between legitimate legislation and confiscation is drawn where the person sought to be taxed, or community sought to be taxed, has no interest in the community, and derives no benefit from the purpose for which the tax is levied.

The taxation here is not analogous to the taxation of the property of a married woman, who cannot vote, or of a minor, whose persons and property are both under the protection of the law of their domicile. Nor is it analogous to the taxation of the property of non-residents, whose property is under the protection of the law of its situs, and where taxation is sought to be invoked for the purpose of protecting his property and the support of the government of its situs.

Here is simply a bold declaration that property that is not situated in Kay County shall be taxed there, and that property that is not subject to the Laws of the Territory, shall be taxed for a territorial government that, practically, affords it no protection.

The Act itself is a recognition of the fact that this property is not deemed to be a part of the property of Kay County.

The last clause of the Act by which these taxes are sought to be enforced contains the following:

"*Provided*, That the assessed valuation of such attached territory shall in no case be taken as a basis for the creation of a bonded indebtedness of the county to which it is attached, or in estimating or limiting the same."

The legislature recognized the fact that Congress had delegated to the Supreme Court of the Territory the control over these Indian reservations, and the only thing the legislature has tried to do by the Act in question is to send into these Indian reservations the hand of the tax-gatherer to compel the people in these Indian reservations to contribute to the support of the government of Kay County, and relieve the residents of that county from bearing the burdens of maintaining their own county organization, and to relieve the people of the Territory, to that extent, from bearing the burdens of a territorial government, whose laws do not furnish any protection to the property situated in these Indian reservations, that has been taken there under the sanction of an Act of Congress authorizing the Indians to lease these lands for grazing purposes.

The case of *Fisher vs. Utah & Northern Railway Company*, 116 U. S., 28, is relied upon by appellant. In that case it appears from the opinion of Mr. Justice Field, that :

"A strip of land and several parcels adjoining it, forming a part of the reservation, were ceded to the United States for the consideration of \$6,000, to be used by the company and its successors or assigns as a right of way

and road-bed, and for depots, stations, and other structures. By an Act of Congress confirmatory of the agreement the same right of way was relinquished by the United States to the company for the construction of its road; and the use of the several parcels of land intended for depots, stations, and other structures was granted to the company and its successors or assigns, upon the payment to the United States of the \$6,000; and on the condition of paying any damages which the United States or Indians, individuals or in their tribal capacity, might sustain, etc. \* \* \* \* \*

"By force of the cession thus made, the land upon which the railroad and other property of the plaintiff are situated was, so far as necessary for the construction and working of the road, and the construction and use of buildings connected therewith, withdrawn from the reservation. The road and property thereupon became subject to the laws of the Territory relating to railroads, as if the reservation had never existed. The very terms on which the plaintiff became a corporation in the Territory rendered it subject to all such laws, and, of course, to those by which the tax in controversy was imposed."

It also appears in that case that the property sought to be taxed was situated in the County of Oneida, an organized county of the Territory of Idaho.

It is, therefore, not a parallel case with the case at bar.

The case of *Langford vs. Monteith*, 102 U. S., 143, is cited.

Of course, under the provisions of our Organic Act, judicial process may run into these Indian reservations, and that is all that is decided in the case of *Langford vs. Monteith*.

The case of *Maricopa & Phoenix Railroad Company vs. Arizona*, 26 Pac. Rep. 310, 156 U. S., 347, was also a case in which a right-of-way had been granted to a railroad company, through an Indian reservation. In the statement of facts, page 350, it appears that the tax was levied "upon all the property of said Maricopa and Phoenix Railroad Company situated in said county of Maricopa, and described as follows, to-wit: "The 24.16 miles of main track, with franchises and right-of-way," which shows that the railroad property was not only within the jurisdiction of the Territory, but was within the jurisdiction of the organized county; which is not the fact in the case at bar.

The case of *Torrey vs. Baldwin*, 26 Pac. Rep. 908, is also relied upon. In the statement of facts in this case it appears that "the questions raised by demurrer, and, as is stated in the certificate of the said district court: 'Whether the county of Fremont, *within the geographical boundaries of which is situated said Shoshone Indian reservation*, had in the year 1889, any right, authority or jurisdiction to assess for taxation and levy a tax upon the cattle and horses of the plaintiff, which were during all of that year kept and located upon the said Shoshone Indian reservation; and whether said cattle and horses of the plaintiff, as kept and located upon said reservation during that year, were subject to taxation in said county for that year. \* \* \*'"

In this case, the reservation was a part of the organized county of Fremont, and therefore the case is not applicable.

## V.

The said Act of the Legislature is void in that it is in conflict with the provisions of the Organic Act providing that the Legislature of the Territory "shall not pass any law impairing the right to private property, nor shall any unequal discriminations be made in taxing different kinds of property, but all property subject to taxation shall be taxed in proportion to its value," and the said Act is also a discrimination in the taxation of the same kind of property, and violates the rule of uniformity in taxation.

Section 6 of the Organic Act of the Territory (26 Stat. at L., p. 84), among other things, provides:

*"No tax shall be imposed upon the property of the United States, nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents, nor shall any law be passed impairing the right to private property, nor shall any unequal discrimination be made in taxing different kinds of property, but all property subject to taxation shall be taxed in proportion to its value."*

It is submitted that no more rigid expression of the rule of uniformity in taxation can be found in the Constitution of any State than that above quoted. It necessarily declares all private property located within the proper jurisdiction of the Legislature of the Territory to be subject to taxation, for no property could be omitted from taxation without making a distinction in



taxing different kinds of property. The expression, "subject to taxation," manifestly refers to all property except that which the Organic Act itself exempts, unless a necessary implication results in favor of public property and property devoted to educational, charitable and benevolent purposes. Whether such necessary implication exists is needless to inquire. It is also true, as remarked by Caldwell, J., in construing a similar passage in *N. P. Rld. Co. vs. Walker*, 47 Fed. 686: "The prohibition in the Organic Act against making any discrimination in taxing different kinds of property, necessarily implies a prohibition against any discrimination in taxing the same kind of property." It may be further remarked that the case does not present an exact parallel with the proposition to invalidate a law of a State Legislature under a permanent Constitution, where every presumption and every intendment is taken in favor of the law, even to the restriction of the language of the constitutional enactment. The Territorial government and its organic law is temporary. The Territorial Legislature acts under a statute conferring distinct powers and its acts do not partake to the same extent of that sovereign quality imputed to State Legislatures. In the Territorial government the real sovereignty subsists in Congress and not in the people. The rules of construction involved in the determination of the constitutionality of the law under a State Constitution, are to be relaxed in testing the validity of a law of a Territory under its Organic Act. The language made use of by the supreme law-making power for the Territory is not to be subjected to a restrictive construction, as is often done in construing State Constitutions.

We cannot study the course of State decisions in expounding questions of constitutional law under their constitutions without being strikingly impressed with the fact that excessive refinements are too often indulged in. In the light of our judicial history, what would there be left of the Federal Constitution if the State Courts had been its sole expounders? The answer is obvious. Nor is this result attributable to the dual character of our government, but is chiefly attributable to the narrow methods of construction too often adopted, not only in expounding the Federal Constitution but in expounding their own. They set the law in the prisoners' box and refuse to condemn it as infringing the Constitution until it has been convicted beyond all doubt, both reasonable and unreasonable. How often we encounter, in reading State decisions, as a preliminary to a hard case making bad law, that apologetic expression, "We cannot interfere with the action of a co-ordinate branch of the government without being clearly and fully satisfied that the legislature has transcended its power, and we therefore uphold this law, not because we are satisfied that the legislature has acted within the scope of its powers, but rather because we are not clearly satisfied that it has not." More sins of construction have been committed under this specious reasoning than could be catalogued in a book. These Scotch verdicts are more common than direct decisions on the real validity of the laws. It is pleasant to turn from this picture of irrational dogmatism to the language of Mr. Justice Bradley, in *Boyd vs. U. S.*, 116 U. S., 635, where he says:

"Illegitimate and unconstitutional practices get their first

footing in that way, viz.: By silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions, for the security of person and property, should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of Courts to be watchful for the constitutional rights of citizens against any stealthy encroachments thereon. Their motto should be *obsta principiis*."

There is no place where hard cases make bad law more often than in the test of Legislative power, nor is there any place where the cool, better judgment of the judiciary is more often called upon to yield itself to the sway of considerations of expediency, masked behind an attempt at uphill reasoning, than cases involving the constitutionality of tax laws. No more striking illustration of the subject can be found than that construction placed by some courts upon constitutional rules of uniformity which permit the legislature to exercise the power of taxing some classes of property and not taxing others, and denies to it the right to tax different classes of property at different rates, though the difference is ever so slight. A variation of a thousandth part of a mill in the rate of taxing different classes of property once subject to taxation avoids the law, but a variation which goes to the full length and taxes one class of property at a double rate, and releases another altogether, is not open to the objection. Yet no court adopting this construction has paused to consider what ridiculously absurd motives such a construction imposes to the framers of a constitutional provision of this character in giving

the Legislature the power to pass an altogether vicious measure, and restraining it from implanting the same vice in the laws in a slight degree.

This is the inspiration from which the Court below drew its reasoning. This is the reasoning of the Supreme Court of Dakota Territory in *Ferris vs. Vannier*, 42 N. W. Rep. 31, under a similar Organic Act, where it was held that the prohibition against discrimination in taxing different kinds of property only extended to prevent taxing different kinds of property at different rates, and would not prevent the imposition of the entire burden on one class of property and exempting another.

While the objections we shall urge go largely to discriminations, after the Legislature has actually declared the property to be taxable, many of the cases announce principles which counsel asked to have applied as a rule for the guidance of the court in this case, draw their inspiration, primarily, from this fundamental error which permeates the whole, and their reasoning is traceable to it.

This is the first time this Court has been called upon unfettered by binding instructions of some Supreme Court of a State, to construe a clause of the character in question, and we submit that its guarantees are not to be submitted to the erosive process of a strict construction, but that its provisions should be construed liberally and and by the same canons of interpretation which this Court applies in all cases of constitutional authority, where it is not obliged to yield its assent to the final decision of the highest Court of some State.

In the case of *Francis vs. Railroad Co.*, 19 Kan. 303, the various constitutional provisions of the states on the subject of uniformity in taxation are collected and compared, and by a comparison of the Organic Act with the various provisions collected in that case, that act clearly falls within that class which contains directions to tax all property and prohibits the legislature from selecting any class to bear a given public burden as was done and upheld in *Commrs. vs. Nelson*, 19 Kan. 234, though practically overruled by the later case of *Marion, etc., Rld. Co. vs. Champlin*, 37 Kan. 682. This provision of the Organic Act of the Territory imports a different and wider prohibition than that contained in the fourteenth amendment to the Constitution prohibiting the deprivation of property without due process of law. If not, it is meaningless, because by Section 28 of the Organic Act the Constitution of the United States is expressly put in force in the Territory, and the tax clause contained in Section 6 need not have been enacted. We submit the three inhibitions of this Act, (1) against taxing the property of non-residents higher than that of residents; (2) making unequal discriminations in taxing different kinds of property; (3) requiring all property subject to taxation to be taxed in proportion to its value, are the constitutional restrictions on the power of the of the Territorial Legislative Assembly which nullify this law. Whatever may be the rule where discrepancies in valuation of the property of the taxpayer arise from accident or the varying judgment or partiality of those entrusted with its execution and the resultant burdens varying thereby; in short, from their disobedience of the law, we insist that when every official charged with the perform-

ance of a duty under the law executes that duty with strict impartiality and faithfulness to the requirements of the law, which necessarily results in inequality in the burdens imposed, that such inequality is the fault of the law and therefore within constitutional inhibition.

The plaintiffs are all non-residents of the Territory. It is admitted that the property was valued higher on account of the flight of time, the growth of the animals, the improvement in their condition and an increased market value, and that other property in the county proper and throughout the Territory of the same kind likewise enhanced in value within the same period. The complainants' property was assessed as of May 1st at its actual value. Other property of the same kind was assessed as of February 1st at its actual value on that date. If these causes had worked double the value of the property in the intervening period, the property assessed last would pay a double tax. It is said by the Court below that the legislature was familiar with the conditions existing in these reservations. It is too plainly manifest that they were entirely familiar with conditions and familiar with the fact that these reservations were occupied by drovers who lived beyond the jurisdiction of the Territory and shipped their cattle into these reservations for the purpose of pasturage. They knew by treating these reservations as a class they were also leveling a tax at the property of non-residents of the Territory, and the case is just as plain as though they had been expressly classed as non-residents in so many words in the Act itself. It is insisted, however, that extraordinary conditions



existed in these reservations authorizing the legislature to make two classes of cattle and call them different classes of property and to affix different methods for the valuation thereof, at a different time, by a different tribunal, with a different authority, for the correction of assessments.

If that be true, the treatment of this property as a separate class must cease at the point where substantial distinctions disappear, and if it be conceded that the date of the inventory of the property for taxation even may be varied, to meet the actual presence within the bounds of the reservation of the greatest number of cattle, there is no necessity for making the inventory and the valuation concurrent. The township assessor actually assesses the property in the organized counties at any time between February first and the first Monday of May (see pp. 5582 and 5624, Rev. Stat. Okla., 1893). During the month of April and a part of the month of May, therefore, the special assessor for the Indian reservations and the regular assessor in the organized counties are both engaged in the performance of their duty, the one assessing cattle at its value on May first and the other at its value on February first. Should property be brought into the organized part of the Territory after the first day of May and before the first day of September, the assessor assesses such property as of the first day of February for that year. It is therefore seen that the legislature do not regard the fact of assessment or the liability of property for taxation as at all necessarily concurrent with the time when the valuation is to be imposed; so that whatever excuse may be

offered for a law changing the time when the same class of property so situated shall become liable to taxation, or varying the time when the assessor shall in fact perform his duty, there is no exigency which requires a valuation to be affixed to the property at a different date in the one case from that resorted to in the other. An owner takes one herd to the reservation during the month of February; another herd to some organized part of the Territory in the month of January; another herd to some organized part of the Territory in the month of February; another herd to some organized part of the Territory during the month of March. Those herds located in the organized part of the Territory in January and March, may be valued by the assessor as late as the first Monday in May at the value they possessed on the first day of February. That herd located in the organized part of the Territory during the month of February is not valued at all for taxation, and that herd located in the Indian reservation may be valued on the first day of April, and its value affixed at what the assessor may believe it will be likely to be worth on the ensuing first day of May. The herd taken into the Territory proper during the month of March may be valued at ten dollars per head, because that was their value on the first day of February. The herd taken into the reservation may be valued at twenty dollars per head, its value on May first, resulting in a double tax, a condition not at all improbable or impossible to any commodity possessing a fluctuating value, as is true with respect to cattle. The object of this tax was to reach these migratory herds of cattle. If the legislature can exempt migratory property arriving in the Territory proper for

one month, may they not exempt it altogether? In short, what is to prevent them from taxing migratory property in one part of the Territory and exempting it in another? Again, if the legislature is warranted in affixing different times for the valuation of property for mere purpose of catching an increased inventory for the purpose of assessment, and thus varying the time of inventorying the same class of property in different parts of the Territory, why may they not equally consult every business exigency—tax the merchants of one part of the Territory at a time when, under known business usage they are stocked up in anticipation of a heavy trade? tax the railroads at that period of the year when they usually have the greatest equipment in service? tax the wheat of the farmer just after harvest and before he has had an opportunity to market it? or favor other lines of business in the same way by taxing it at a time when it is likely to impose the lightest burden? If the principle of this discrimination is to be admitted, there is no limit to the extent to which it could be pushed, and the constitutional requirement for uniformity could be nullified by these artful evasions. There is no difference between the fixing of different values to property and fixing different times for its valuation, which would produce the same result, because the fixing of values to property possessing a fluctuating value at different times fixes different values. The court below says the legislature passed this law in view of existing conditions in these reservations. The legislature undoubtedly understood that the drovers were removing large herds to these reservations in the spring of the year from the western arid plains for the purpose of putting them on the grass and

fattening them for the market; that they would arrive in an almost starving condition and that the pasturage would speedily fatten them. They knew it would be one thing to value these cattle as of the first of February and another thing altogether to value them as of the first day of May. The owners of this property were not the constituents of the body that enacted this law. The imposition of an undue burden and the relief of their constituents to that extent would be a matter of commendation rather than a matter of criticism, and it was simply a question of attempting to get the most they could out of these cattle for the benefit of the residents of the Territory.

Time is always of the essence of value, and is so recognized in every department of the law, whether it be for the valuation of personal property or real property, and in every instance when the value of property becomes a matter for judicial inquiry, it is limited to some particular time. That time has always been a matter of importance for the courts to determine. In judicial investigation of every question of value, values at a different time than that to which the investigation is limited are regarded as inadmissible without evidence of comparison between the value at the material date and the time to which the evidence is coupled. The tax laws of the Territory recognize this principle, that value is dependent on time by requiring real estate to be valued as of the first day of January, personal property generally as of the first day of February, and personal property in unorganized country as of the first day of May. In short, the legislation under consideration admits the

point that time is of the essence of value. Among the authorities we rely upon, is *Graham vs. The Board of Co. Comm'rs.*, 31 Kan., 473, where it is held that a law authorizing the imposition of a tax on cattle brought into the State after the first day of March, which made no provision for taxing other kinds of property brought into the State after that date, violated the rule of uniformity prescribed in the Constitution of the State and is void. The effect of this ruling is sought to be obviated by pointing to the Session Laws of 1895, p. 229, known as the transient property law, which, it is claimed, meets the objection to the constitutionality of the law as announced in *Graham vs. The Board of Co. Comm'rs.*, *supra*. This statute does not have this effect, for two reasons: If it is regarded as valid it does not meet the objection, because the cattle of the complainants are discriminated against by this law. It does not pretend to tax property brought into the Territory during the month of February. It requires a valuation of this property as of February first, and if the property is brought in by a person, firm or corporation acquiring a settlement in the Territory, it permits it to escape taxation by showing that it has been assessed for taxation in some other State or county of the Territory for the same year. The *Graham* case turns upon the important principle that if other property brought into the Territory after the ordinary date when property becomes liable for taxation, is not equally taxed the rule of uniformity is violated. The legislature for some reason has omitted property brought in during the month of February. If this transient property tax law is an answer to the objection in the *Graham* case, it would be equally

good to tax only transient property brought into the Territory on the fourth day of July. It is not a matter of degree, but a matter of principle. But there is no valid law which authorizes the taxation of transient property in the Territory. The discriminations found in this Act itself between resident and non-resident owners have the effect to nullify the law. The individual partnership or corporation which brings property into the Territory after the first day of March, incident to a settlement and domicile in the Territory, cannot be taxed if his property has been assessed elsewhere for taxation that year. A non-resident of the Territory who brings property in after the first day of March cannot escape taxation by making such showing. It is also worthy of remark in this connection that the petition alleges that the major part of the property of the plaintiffs had been assessed for the year 1895 in the states from whence the same was removed, and that the taxes so imposed were a personal charge against each of the plaintiffs and could be collected. They plead the very exception which is allowed in favor of the citizens of the Territory.

We therefore submit that the rule laid down in *Graham vs. Commissioners, supra*, is applicable to this case in every essential respect. If the assessment of transient property in the organized parts of the Territory under these restrictions is a commensurate imposition of taxes on transient property elsewhere to uphold the tax on this transient property in the reservations, what bounds can be set to the action of the legislature in that respect? As above suggested, they might confine it to a single day or to Sundays. The question is one upon which very little



direct authority can be cited. *Ferris vs. Vannier*, 42 N. W. Rep. 31, construing a similar Organic Act to authorize the Legislative Assembly of the Territory to select its subjects for taxation, in addition to being a manifestly unsound exposition of the meaning of the law in question; is, in effect, an overruled case.

*N. P. Rld. Co. vs. McGinnis*, (N. D.) 61 Pac. 1032.

*Rld. Co. vs. Walker*, 47 Fed. 681.

*In re Construction of Revenue Law*, (S. D.) 48 N. W. 813.

The Court below relied in its decision on this point exclusively on the case of *Nelson Lumber Co. vs. Lorain*, 22 Fed. 54. In that case the times of inventory of the property under consideration were variant but the time for valuation was concurrent, and Judge Bunn, in rendering that decision, emphasized the fact that no claim was made of any discrepancy in the valuation of the property. The decision largely proceeds upon this ground and is rather in favor of than against the proposition that varying dates for valuation produce variation in values. Had the legislation under consideration stopped at the point of varying dates for the inventory of property, as was the case in Wisconsin law, it would present altogether a different question. If it be said that it is difficult in April to value property as of the first day of February, it is a difficulty which the legislature have imposed in the case of all other property, because the assessor is vested with a discretion to commence his duties any time after the first day of February and to finish

before the first Monday in May. It certainly presents no more difficulty than that imposed by the legislature in this reservation tax law upon the assessor to commence the performance of his duties in April and to assess the property at its value at a future date.

Counsel also cite *People vs. Springvalley Hydraulic Gold Co.*, 92 N. Y. 383; *People vs. Commissioners*, 91 N. Y. 593; *State vs. Lindell Hotel Co.*, 9 Mo. App. 450; *Assn., etc., vs. Mayor, etc.*, 104 N. Y. 581. These cases are wholly inapplicable, as no question of legislative power to enact the laws under consideration was involved in either case and it was purely a matter of legislative construction.

The case of *Shotwell vs. Moore*, 129 U. S. 590, is also cited, wherein the language of this Court approved the method of ascertaining the property of merchants by monthly average for the preceding year. This same rule also received the approval of the Supreme Court of Ohio in *Shotwell vs. Moore*, 45 Ohio State, 623; but it argues nothing, because this method is nothing but an evidentiary proceeding to ascertain the true amount of the capital of the merchants invested in their business at the same date when other property is assessed, and neither this Court nor the Supreme Court of Ohio would look with that same degree of favor on a law which would studiously assess a merchant's stock at a time when they were known to be heavily stocked, according to custom of their business, at a different time from what other property is assessed. That is precisely the difference between those cases and the case at bar. The case of *Wis. Cent. Rld. Co. vs. Lincoln Co.*, 57 Wis. 137; 15 N. W. Rep. 121,

which held that a valuation of personal property as of May first and a valuation of real estate at any time between May first and the last Monday in June did not violate the provision for uniformity of taxation in the Wisconsin Constitution. This case rests directly on no authority, but is the outgrowth of a line of decisions in that State which upheld the principle that under the limitations of the Wisconsin Constitution the legislature may make substantial discriminations in taxing different kinds of property, but whether that ruling is sound or not no claim was made in that case that a disparity of values was produced by the varied dates for the valuation of property. At any rate, the Wisconsin decisions will afford but little aid to the settlement of this question because of the dissimilarity between the constitutional provision under consideration there and that under consideration here. Even if it were otherwise, authority for taxing different classes of property at a different time is not authority for an arbitrary subdivision of the same kind of property and fixing different times for the valuation thereof.

*Commissioners vs. Nelson*, 19 Kan. 234, is also relied upon by counsel for appellant. This case held that the legislature might impose a tax for some public purposes on the real estate in a municipality alone. The force of that authority, however, is weakened if not entirely destroyed by the case of *Marion, etc., Rld. Co. vs. Champlin*, 37 Kan. 682, in which it is held that a tax levied on property of the residents of a township for road purposes under legislative sanction is void for want of uniformity.

*In Knowlton vs. Board of Supervisors of Rock County*, 9 Wis. 378, Chief Justice Dixon uses the following language:

"It is believed that if the legislature can, by classification, thus arbitrarily and without regard to value, discriminate in the same municipal corporation between personal and real property within, and personal and real property without, a recorded plat, they can also, by the same means, discriminate between lands used for one purpose and those used for another; such as lands used for growing wheat and those used for growing corn, or any other crop; meadow lands and pasture lands; cultivated and uncultivated lands; or they can classify by the description, such as odd numbered lots and blocks and even numbered ones, or odd and even numbered sections. Personal property can be classified by its character, use or description, or, as in the present case, by its *location*, and thus the *rules* of taxation may be multiplied to an extent equal in number to the different kinds, uses, descriptions and locations of real and personal property. We do not see why the system may not be carried further and the classification be made by the character, trade, profession or business of the owners. For certainly this rule of uniformity can as well be applied to such a classification as any other, and thus the constitutional provision be saved intact. Such a construction would make the Constitution operative only to the extent of prohibiting the legislature from discriminating in favor of particular individuals, and would reduce the people, while considering so grave and important a proposition, to the ridiculous attitude of saying to the legislature; 'you shall not discriminate between single individuals or corporations, but you may divide the citizens up into different classes as the followers of different trades, professions, or kinds of business, or as the owners of different species or descriptions of property,

and legislate for one class and against another, as much as you please, provided you serve all of the favored or unfavored classes alike;' thus affording a direct and solemn constitutional sanction to the system of taxation so manifestly and grossly unjust, that it will not find an apologist anywhere, at least outside of those who are the recipients of its favors. We do not believe the framers of that instrument intended such a construction, and therefore cannot adopt it."

In *Inhabitants of Cheshire vs. County Commissioners*, 118 Mass. 386, Wells, J., in the opinion of the court, says:

"It appears to us that the practical operation of this statute, construed as we have found ourselves compelled to construe its terms, is directly and necessarily to produce disproportion to a greater or less extent, in the levy of all taxes based upon valuations which include such property as that to which it applies. That being its necessary tendency, it is immaterial whether the effect upon the general distribution of the tax be great or small, it is equally in violation of the Constitution, and therefore not within the legitimate authority of the legislature."

In addition to the authorities already cited and as having some bearing upon the principles involved in the case, we cite.

*Co. Commrs. vs. Wilson*, 15 Col. 90; 24 Pac. Rep. 563.

*Railroad Tax Cases*, 8 Sawyer 250.

*Cunningham vs. The Bank*, 101 U. S. 533.

*Rld. Tax Cas.*, 92 U. S. 575.

*Cooley on Taxation*, 218.

*State vs. O'Brian*, 89 Mo. 631.

*Ky. Rld Co. Tax Cas.*, 115 U. S. 321.

*Co. Commrs. vs. Dunn*, (Colo.) 40 Pac. 357.

*State vs. Dalrymple*, 49 N. J. L. 530.

*Cox vs. Truitt*, (N. J.) 31 Atl. 168.

*Welty on Assessments*, Sec. 185.

*Hale vs. City of Kenosha*, 29 Wis. 599.

*Primm vs. City of Bellville*, 59 Ill. 142.

*Bright vs. McCullough*, 27 Ind. 223.

*Field vs. Commissioners of Highland County*,  
36 Ohio State, 476.

We believe the relation between the taxpayers of a Territory, and especially between resident and non-resident tax-payers, is analogous with that subsisting between National Banks and other moneyed corporations in a state, and that rule stated in *Boyer vs. Boyer*, 113 U. S. 689, ought to be applied to discriminations pointed out in this case between the plaintiffs and the other taxpayers of the Territory. Mr. Justice Bradley, delivering the opinion of the Court in that case, says:

"The exemptions in favor of other moneyed capital appear to be of such a substantial character in amount as to take the present case out of the operation of the rule that it is not absolute equality that is contemplated by the act of Congress; a rule which rests upon the ground that exact uniformity or equality of taxation cannot in the nature of things be expected or attained under any system. But as substantial equality is attainable and is required by the supreme law of the land, in respect as state taxation of national bank shares when the inequality is so palpable as to show that the discrimination against capital invested in such shares, is serious, the courts have no discretion but to interfere."



The imposition of the rule of uniformity in the national banking law between national banks and other moneyed institutions in a state, is not more stringent than that imposed as between all taxpayers in the Organic Act of the Territory.

Counsel claim that the natural growth of the property in value has its compensating effect in the assessment of the property of other taxpayers in the Territory, because on the first day of February they are taxed upon the feed and forage which they subsequently feed to their cattle to produce the commensurate growth. Can the legislature tax the provender fed to these cattle in Texas or the grass in the Indian reservation. If they can it would still be no answer to the element of increase from changes in the market.

## VI.

**That the said Act of the legislature is void in that it is local and special legislation, and in violation of the provisions of Section 1, of the Act of Congress of July 30, 1886.**

That said Act of Congress, Vol. 24 U. S., Stat. at Large, 170, ch. 818, provides:

"That the Legislatures of the Territories of the United States now or hereafter to be organized, shall not pass local or special laws in any of the following enumerated cases:

\* \* \* \* \*

"For the assessment and collection of taxes for Territorial, County, Township or road purposes."

\* \* \* \* \*

"In all other cases where a general law can be made applicable no special law shall be enacted in any of the

Territories of the United States by the Territorial Legislatures thereof."

Mr. Cooley in his work on Taxation, Second Edition, at page 325, says:

"The Legislative Act for the levy of a tax, as much as in any other case, must be passed under the restrictions of the Constitution, or it can have no validity. Therefore, when the Constitution requires an Act to have but one object, which shall be expressed in the title, the requirement must be complied with. And if local or special laws are forbidden by the Constitution, they will be void in tax cases."

A more satisfactory statement of the doctrine peculiarly applicable to this subject cannot be found than that given by Mr. Sutherland in his work on Statutory Construction, Secs. 127 and 128:

"A law may be general in its terms and apply to a class, constituted by having characteristics which make it a class, and yet be an illusory classification, which will not warrant legislation confined to it, where special or local legislation is prohibited. The grouping must be founded on peculiarities requiring legislation, and legislation, which, by reason of the absence of such peculiarities, is not necessary or applicable outside of that class. In other words, the true principle requires something more than a mere designation by such characteristics as will serve to classify, for the characteristics which will thus serve a basis for classification must be of such a nature as to mark the objects, so designated as peculiarly requiring exclusive legislation. There must be a substantial distinction, having a reference to the whole subject matter of the proposed legislation, between the objects or places embraced in such legislation and the objects or places excluded. The marks of distinction on which the classification is founded must be such, in the

nature of things, as will, in some reasonable degree, at least account for and justify the restriction of the legislation. Distinctions which do not arise from substantial differences, so marked as to call for separate legislation constitute no ground for supporting such legislation as general."

This Court, in dealing with a kindred subject, where a basis of classification is required in applying the constitutional restriction on a denial of the equal protection of the law (*Rld. Co. vs. Ellis*, 165 U. S. 150) quotes with approval Mr. Justice Catron's declaration in *Van Zandt vs. Waddel*, 2 Yerger 260:

"Every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule and the mass of the community who made the law by another."

And again, from *Dibrell vs. Morris' Heirs*, 15 S. W. 87:

"We conclude upon a review of the cases referred to above, that whether a statute be public or private, special or general, in form, if it attempts to create distinctions and classifications between the citizens of the state, the basis of such classification must be natural and not arbitrary."

And Mr. Justice Brewer, in the same case, speaking for the Court, says:

"But it is said that it is not within the scope of the fourteenth amendment to withhold from states the power of classification, and that if the law deals alike with all of a certain class, it is not obnoxious to the charge of a denial of equal protection. While as a general proposi-

tion this is undeniably true, yet it is equally true that such classification cannot be made arbitrarily."

And also quotes the language of Black, J., in *State vs. Loomis*, 115 Mo. 307:

"Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that the differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations."

And again, for the Court in the main case:

"It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in each of these it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which supports a just and proper relation to the attempted classification—and is not a mere arbitrary selection."

Burgess, J., in *State vs. Granneman* (Mo.), 33 S. W. Rep. 785, speaking of a similar constitutional provision, says:

"It is to prohibit local and special legislation and to substitute general law in the place of it, *wherever by general laws the same ends could be accomplished.*"

Henshaw, J., in the opinion of the Court in *Ex Parte Jentsch*, (Cal.) 44 Pac. Rep. 803, says:

"A law is not always general because it operates upon all within a class. *There must be back of that a substantial reason why it is made to operate only upon a class and not generally upon all.*"

\* \* \* \* \*

"The classification, however, must be founded upon differences which are either defined by the Constitution or natural, and which will suggest a reason which might rationally be held to justify the diversity of legislation."

These expressions are in accord with all the authorities.

*State vs. Cooley*, (Minn.) 58 N. W. Rep. 150.

*Rutgers vs. City of New Brunswick*, 42 N. J. Law, 53.

*VanRiper vs. Parsons*, 40 N. J. Law, 1.

*Guthrie Daily Leader vs. Cameron*, (Okla.) 41 Pac. Rep. 635.

*Kimball vs. Rosendale*, 42 Wis. 407.

*In re application of Church*, 92 N. Y. 4.

We now invite the attention of the Court to the actual differences in the provisions of law affecting the citizens of the Territory generally as taxpayers, and those affecting the taxpayers in the unorganized districts and reservations.

*First.* The general statutes tax all property in the organized part of the Territory, and in the Indian reservations only one class of property.

"All property, whether real or personal, all moneys, notes or investments in bonds, or stock owned by joint stock companies, or otherwise, of persons residing in this Territory, the property of corporations now existing or hereafter created, and the property of all banks or banking companies now existing or hereafter created," etc., is the language of Paragraph 5577 of the Revised Statutes of the Territory, declaring what property shall be

subject to taxation within the proper limits of the Territory.

"That when any cattle are kept or grazed or any other personal property is situated in any unorganized country, district or reservation of this Territory," etc., is the language of Section 1 of the Act in question, declaring what property shall be subject to taxation in any unorganized country.

The latter clause must be construed to embrace cattle and such other classes of personal property only as may be *ejusdem generis* therewith.

Sutherland on Statutory Construction, Secs. 268, 269, 270, 272, and 273.

The term "cattle" was probably used in its generic sense to include domestic animals generally.

*Decatur Bank vs. St. Louis Bank*, 21 Wall. 299.

The import of the law is simply nothing more nor less than to tax domestic animals in those reservations, and will not admit of a construction broad enough to reach all classes of personal property, such as merchandise choses in action, growing crops, household goods, farming implements; and other property of like character.

*Second.* Throughout the Territory generally property is assessed by the township trustees in the townships; (§ 6061, Okla. 1893); by city and township assessors in cities and towns. (§ 6062, Id). In cities and towns the assessors are elected annually, (§ 6062, Id.) and in townships are elected bi-ennially. (§ 6014, Id.)

Section one of the Act under consideration provides that the Board of County Commissioners shall appoint a



special assessor each year, who shall take the same oath and give the same bond as a township assessor.

City and township assessors are required to be residents and qualified voters in the township or city where elected. (§§ 6015, 547, Id.)

No such requirement is imposed on the special assessor.

*Third.* On the second Monday of January the several township and city assessors are required to meet at the county seat and agree upon an equal cash basis of valuation of all property that they may be called upon to assess.

In this matter the special assessors do not participate, nor are they affected by such proceedings. (Par 6068 Id.)

*Fourth.* The township assessor, township clerk and township treasurer are a township board of equalization. The Mayor, City Clerk and City Assessor are a City Board of Equalization and meet on the third Monday of April and hear all grievances, and their decision is final with regard to all individual assessments. (Par. 5620, Id.)

In the unorganized country complaints of individuals are preferred to the Board of County Commissioners on the first Monday in June, who are given like power in these special cases as given to the Board of Equalization in a township.

S. L. Okla. 1895, page 233.

On the first Monday of June the Board of County Commissioners hold a session for the purpose of equalizing the assessment roll between the different townships in their county. (Par. 5621, Id.)

This section embraces no authority for the relief of the taxpayers in the unorganized country as a class.

*Fifth.* In the organized parts of the Territory the Attorney-General is required to prepare forms of notices for the assessor and lists of property for the taxpayer. These are required to be furnished to the township and city Assessors by the County Clerk, and such township and city Assessors are required to make their assessments by demanding from each person, firm and corporation liable to assessment or their agents, officers or trustees in charge thereof, the execution of one these lists, under oath, and if they neglect or refuse, the assessor shall estimate value of their property from the best information he can obtain. In the event of the owner being absent or unknown, the assessor may ascertain and estimate the value thereof, and many special forms and proceedings are provided for ascertaining the property of banks and corporations. In case the Assessor raises the valuation placed in any list by a taxpayer, he is required to deliver to such taxpayer a copy of the schedule showing the increase. (Par. 5580 to 5601, inclusive, Id.)

None of these requirements are imposed on the special assessor in the unorganized country. (P. 233, S. L. Okla. 1895.) He is given a *carte blanche* to make out his assessment rolls and lists "from the best evidence attainable," and the restrictions for the safety of the taxpayers imposed on the township and city assessors are obliterated in this special enactment.

*Sixth.* Property in the Territory is assessed and inventoried as of the first day of February. Property in the unorganized country on the same date is assessed and

inventoried as of the first day of May, and property removed from the unorganized country during the intervening period is not assessed at all.

*Seventh.* Property brought into the unorganized country during this intervening period becomes liable for taxation for that year; property removed into the organized counties of the Territory becomes liable for taxation for that year in no event except when it acquires its situs during two out of the three intervening months, and then only under the restrictions that if the property belongs to residents and has been assessed elsewhere, either in or out of the Territory, it can not be valued. The first of March being a later date than that imposed for taxation in any of the surrounding states or territories, the effect of this discrimination is to practically exonerate residents of the Territory from the payment of taxes on property acquiring a situs after the first of March.

*Eighth.* The special law provides discrepant periods for the valuation of the same kind of property.

We now invite the attention of the Court to the actual difference in conditions which exist between this unorganized country and the organized counties of the Territory. The unorganized parts of the Territory consist of the Kaw Indian reservation, Osage Indian reservation, Ponca Indian reservation, Otoe and Missouri Indian reservation, and the Wichita, Kiowa, Comanche and Apache Indian reservations. As the property affected by this tax is principally located in the Osage Indian reservation, we shall confine our description to such

matters concerning which this Court will take judicial notice, with reference to that Indian reservation.

The policy of the tribal government and of the Interior Department in the management of the affairs of these Indians have permitted white people to go among them and live as laborers, farmers, artisans, and tenants and squatters, until the actual population of the country is made up of a much greater number of whites than Indians.

The policy of the Act of Congress permitting the tribe, under the sanction of the agent, and Secretary of the Interior, to lease their lands, not needed for farming or allotment, for grazing and mining purposes, has induced the development of a large number of large cattle ranches, in addition to which there are on the Indian reservation a great number of licensed Indian traders, and several small towns.

Many of the Indian citizens, and especially the mixed bloods, have selected large tracts from the best lands, and cultivate the same on an extensive scale. This process has now advanced to such a degree and the white population became so great that Congress, at the last session saw fit to direct the holding of terms of the District Court of the Territory, annually, at Pawhuska, in this reservation. Also bridges leading to this country, 29 St., 531.

The cattle ranch business is conducted on two systems, feeding them in winter and grazing them in summer.

The farming industry, on account of the remoteness of the country from markets, necessarily results in cheap grain, and there is every inducement for feeders to drive

their cattle to these ranches in the winter for the purpose of fattening them in that way on cheap grain.

There is no geographical or physical difference between any part of these Indian reservations and the Territory proper. They are simply a continuation of the same hills, valleys, prairies, and forests. The seasons change at the same time; the organized country and the unorganized country are both inhabited, the soil is generally utilized for the purpose of agriculture and grazing, and the only possible distinction that can be pointed out is the fact that over one extends a municipal government, and over the other there is none.

We have already seen that one of the most valued tests of what is a general or a special law is: Can the same legitimate end be attained by a law which will reach all subjects within its provision, or is there something which cannot be said with regard to all and must necessarily be applied to a few?

With respect to the fact merely of constituting a special tribunal for the purpose of making these assessments, we concede there exists a difference which draws its source from a substantial ground for classification, in the fact that the unorganized Territory is without the machinery provided by the law for the election of assessors as in ordinary cases.

We concede it to be within the power of the legislature, if the property in these Indian reservations is taxable at all, to make a provision for the selection of a special tribunal to make these assessments, but we do not concede it to be within the power of the legislature to authorize the selection of an individual from outside of

the body of the people to be affected thereby, in the one case allowing the people to be assessed by a person who owes his official position to their suffrages, and in the other by a person who is an alien to them, possesses nothing in common with them and is likely to go among them with decidedly antagonistic feelings. In conceding the right to constitute a special tribunal for this assessment, we do not concede that the necessity for constituting such a tribunal creates the necessity of selecting such a tribunal outside of the body of the people among whom he shall perform his duties.

The legislature have seen fit to favor all the organized portions of the Territory with an assessor who is the near neighbor of every man to be assessed. The selection of an assessor residing within the organized county, as has been the universal practice, and sending him across the border to make these assessments, with the sanction of the law, ought alone to be sufficient to condemn the law.

We do not feel the necessity, however, of predicating an argument on this proposition, and, for the purpose of this argument, shall assume that this special assessor was properly and legally constituted in all respects.

The fact of the appointment of a special assessor reduced all difference.

It is from this point forward that all material distinctions cease between this unorganized country and any other part of the Territory. Beyond this point every attempt at classification for diversity of regulation is illusory. After the appointment of this assessor, if there is any right at all to tax, the unorganized country



for which the assessor is appointed stands on an equal footing with, and is to all intents and purposes, merely a township of the county for the purpose of assessment—is merely a part of the same taxing district.

The case from this point forward presents every aggravated feature that could be presented by requiring the assessor in Newkirk township, in Kay County, to assess property as of the first day of February, and the assessor in Kildare township, in the same County, to assess it as of the first day of May.

But it is said that the known business usage of driving in these large herds of cattle in the spring of the year, after the first of February, warranted the legislature in postponing the date of valuation in the reservations to a later date. But this presents nothing more than is likely to, and which the legislature recognizes, by the transient tax law does occur in the organized counties. If a general law can attain the legitimate end sought by the legislature, a partial law is then a local and a special law, and hence within the constitutional prohibition.

Suppose the Legislature of the Territory had enacted that a special assessor should be appointed for the unorganized attached territory, by the Board of County Commissioners, and who should perform his duties in the same manner as the other assessors of the Territory; then suppose that it had passed a law subjecting to taxation all property which finds its way into the Territory, either organized or unorganized, after the first day of February and before the first day of September, would it not have met what the Court below suggested was the extraordinary conditions obtaining in this

unorganized territory, and entirely dispensed with any necessity for special provisions affecting taxation of property in the unorganized territory.

The basis of classification is imaginary, because the only difference between the unorganized territory and the organized territory, after the first day of February, is that there may possibly be more transient property finding its way into the unorganized territory than does into the organized parts of the territory.

If that kind of a classification is warranted the same rule might be adopted throughout the organized parts of the territory, because in the western counties in the Territory, whose business is chiefly grazing, the same conditions obtain, and, throughout the western half of the Territory there are more cattle brought into the Territory during the period between February first and May first, than are ordinarily kept in such counties throughout the year, and certainly more of the same kind of property in one locality than exists in another will not warrant any chimerical division of such property, due to no other relation than quantity.

It is, therefore, quite clear from the nature of the subject-matter that a general law which should be in force in every part of the Territory, would have met what the Court below was pleased to denominate "extraordinary conditions existing in these Indian reservations," and at the same time would have fairly met in an equal manner those same conditions which exist throughout all parts of the Territory.

There are, in the Indian reservations: *First*, property which was in the reservation on the first day of February,

and, *second*, property which came afterwards. This same division would apply throughout any of the organized counties of the Territory in the same way. There can be no possible reason suggested why property in the unorganized territory at the date other property is assessed should not be assessed the same way, and that property coming in after that date should not be assessed in the same manner and by the same law that transient property is assessed in the organized counties.

A law which puts two herds of cattle belonging to the same owner, brought into the unorganized and organized parts of the Territory at the same time, for the same purpose, into a separate classification for taxation, may justly be characterized in the language of the Pennsylvania Supreme Court, in *Commonwealth vs. Patten*, 88 Pa. St. 258, as "classification run mad."

The case of *Van Loon vs. Engle*, (Pa.) 33 Atl. Rep. 77, is directly in point on this question, where it is held that the ordinary classification of cities might afford a basis for variations in the manner of collecting city taxes, but affords no basis for variations in the methods of collecting state, county, school and poor taxes.

This attempt at classification is based on nothing but a mere business exigency which permeates the entire Territory.

It is said that the condition existing in these reservations are extraordinary on account of bringing cattle in during the grazing season. That is not true. Precisely similar conditions obtain in all of the west half of the Territory, which is practically devoted to grazing. The legislature have recognized that fact by

passing a free range law for the west half of the Territory, and by providing for leasing the public lands in the western portion of the Territory in large tracts, and in the eastern portion of the Territory in small tracts. (S. L. 1897, p. 41, Council Joint Res. 16, L. 1895, p. 273).

The spring grazing industry is just as great in the organized parts of the Territory as it is in the unorganized, a matter of which this court will take judicial notice from the course of the legislation of the Territory, and from its notorious character as a matter of public knowledge.

The law is precisely like one in principle, which singles out barbers and prohibits them from exercising their calling on Sunday, which is condemned as local, special and unconstitutional in *Eden vs. People*, 161 Ill. 296.

*State vs. Granneman*, (Mo.) 33 S. W. Rep. 984.

*Ex Parte Jentzsch*, (Cal.) 44 Pac. Rep. 803.

A constitutional enactment prohibiting the enactment of special laws for the assessment or collection of taxes extends to all proceedings requisite to raise money by taxation, and not merely to "assessment and collection" of such proceedings.

*Chicago, etc. Railroad Company vs. Forest* (Wis.), 70 N. W., Rep., 77.

A constitutional provision containing an enumerated list in which the legislature may not pass special or local laws, and a general clause prohibiting special legislation, when a general law can be made applicable, is an abso-

lute prohibition in the cases enumerated, and a qualified prohibition in those not.

*Gentile vs. State*, 29 Ind., 409.

*State vs. Colson*, (Ind.), 29 N. E. Rep., 595.

*State vs. City of Des Moines*, (Ia.), 65 N. W. Rep., 818.

The law in question is more arbitrary and illusory in its attempt at classification than either or any of the following cases, where the classification has been condemned and the law held inoperative under similar constitutional provisions.

An Act authorizing boroughs at seaside resorts to levy greater taxes for municipal revenues than may be levied by inland boroughs. *State vs. Philbrick*, (N. J.) 15 Atl. Rep. 577.

An Act relating to police, excluding from its operation sea-side towns. *Clark vs. Cape May*, (N. J.) 14 Atl. Rep. 591.

An act authorizing the formation of borough governments at sea-side resorts. *State vs. Somers Point*, 18 Atl. Rep. 694.

An Act making provision for the refunding of taxes in counties containing a city of the first class. *County Commrs. vs. Rosche*, (Ohio) 33 N. E. Rep. 408.

An Act making poor tax a lien on real estate except in cities of the second and fourth class. *Smith vs. Meadowbrook Brewing Co.*, 3 Lack & Jur. 145.

An Act providing that assessments against real estate in cities of the second class should be a lien against the real owner, whether named or not, and that a sale under such proceedings should vest a good title. *Safe Deposit*

*Trust Co. vs. Frick*, 152 Pa. St. 231; *McKay vs. Traynor*, 152 Pa. St. 242; 25 Atl. Rep. 530.

Or that provides that taxes shall be a lien throughout the State except in cities of a certain class. *Van Loon vs. Engle*, (Pa.), 33 Atl. Rep., 77.

A law which permits license taxes collected under county authority within cities to be turned into the city treasury for the use of the streets, and requires such licenses so collected outside of such cities to be turned into the county treasury. *San Luis Obispo vs. Graves*, 84 Cal., 71; 23 Pac. Rep., 1032.

A law making separate regulations in those boroughs where the governing power of the boroughs issues license to sell intoxicating liquors from those obtaining in boroughs where the power to issue licenses is possessed by Courts. *State vs. Hover*, (N. J.), 33 Atl. Rep., 217.

*Loucks vs. Bradshaw*, (N. J.), 27 Atl. Rep., 935.

A law which authorizes an amount to be charged by a municipality for issuing a dram-shop license, above the amount fixed by law, and authorizes such an increase in the amount to be imposed on a petition of one-fifth of the voters, and an election called in pursuance thereof. *State vs. Cramer*, (N. J.), 33 Atl. Rep., 201.

An Act making water rents a lien in cities of the second class. *Pittsburgh vs. Hughes*, 13 Pa. Co. Ct. R. 535,

An Act authorizing taxpayers of townships to make private contracts for the construction of their own roads and exempting them from the payment of road taxes. *In re Lehigh Valley Coal Co.*, 7 Kulp 271.



An Act prohibiting the location of a cemetery within a mile from a city of the first class, whose drainage empties into a stream. *City of Philadelphia vs. Westminster Cemetery Co.*, 162 Pa. St. 105.

A division of townships into two classes, those governed by special character and those governed by general law, and separate regulations affecting each. *State vs. Dorland*, (N. J.) 28 Atl. Rep. 599.

An Act making separate regulations as to city physicians in all cities where such regulations are not covered by previous law. *State vs. City of Orange*. (N. J.) 25 Atl. Rep. 268.

An Act consolidating the offices of city assessor, tax collector, street commissioner and chief of police, into a single office in cities which polled less than 600 votes at the election of 1890, when there was but one such city. *Brown vs the City of Tombstone*, (Ariz). 33 Pac. Rep. 587.

An Act conferring on County Attorneys in counties of a certain class the right at their option to appoint a deputy. *Welsh vs. Bromlett*, (Cal.) 33 Pac. Rep. 66.

An Act authorizing the designation of a paper published in the German language for a definite period before the passage of the law, which in effect prevents the future designation of such a paper published for the requisite period after the passage of the law. *State vs. Inhabitants of Trenton*, 24 Atl. Rep. 478.

Act to authorize companies to maintain and operate systems of sewerage in all cities, towns and boroughs, but which, in addition to requiring the consent of the

city authorities in all cases, requires a petition of property owners in one class of cities only *State vs. City of Plainfield*, (N. J.) 24 Atl. 494.

An Act defining the duties of recorders for cities having a certain number of inhabitants, which exempts from its operation cities not accepting its provisions by ordinance. Appeal of *City of Scranton School District*, 113 Pa. St. 176; *Commonwealth vs. Danworth*, 145, Pa. St. 172.

A law which authorizes cities to exercise the right of eminent domain, but which requires cities of a certain class, before resorting to its exercise, to attempt an agreement with the owner. *City of Pasadena vs. Stimpson*, 91 Cal. 238; 27 Pac. 604.

Separate provisions for the removal of county seats in counties possessing court houses worth thirty-five thousand dollars, and those which do not. *Edmonds vs. Herbrandson*, (N. D.) 50 N. W. Rep. 970.

An Act authorizing the relocation of a county seat in counties containing an area of forty-eight congressional townships, in which the county seat had theretofore been located, under a certain statute by a vote less than a majority of all the votes cast at such election. *Adams vs. Smith*, 6 Dak. 94; 50 N. W. Rep. 720.

An Act which provides that county warrants, in all counties but one shall bear interest. *Hotchkiss vs. Marion*, (Mont.) 29 Pac. 821.

A law which charges state indebtedness incurred in building roads through any county in the State as a liability against the county where such road is constructed. *Board vs. Buck*, 51 N. J. L. 155.

A law providing that special terms of court should be held in any county where there is an incorporated city of more than eight thousand inhabitants, more than twenty-seven miles from the county seat. *Commonwealth vs. Patton*, 88 Pa. St. 258; approved in *Scowles' Appeal*, 96 Pa. St. 429; *Morrison vs. Bachert*, 112 Pa. St. 322.

A mode of exercising the right of eminent domain by all cities of a single class, and peculiar to cities of such class. Appeal of Wilbert, 137 Pa. St., 494; *in re City of Pittsburgh*, 138 Pa. St., 401.

An act authorizing a city to appoint additional policemen. *Farrel vs. Board of Trustees*, 85 Cal., 408.

A law incorporating some municipalities into a port, and authorizing them to deepen and maintain the channel of a river. *Cook vs. Port of Portland*, (Or.), 27 Pac. Rep., 263.

An Act providing that in every city having more than two assembly districts, the boundraies of the wards of such cities should correspond therewith, and there being but one such city. *State vs. Newark*, 20 Atl. Rep., 886.

An Act authorizing cities of a certain class to fix the term, rate of compensation, and method of appointment of a city physician. *State vs. Simon*, (N. J.), 22 Atl. Rep., 120.

A law which prohibits the sale of merchandise to employes at a higher rate than others are charged for the same articles. *State vs. Coal Co.*, 33 W. Va., 188; 10 S. E. Rep., 288.

A law which authorizes railroad companies owning their own wharves to maintain ferries. *Thomas vs. Wash Rld. Co.*, 40 Fed. Rep. 126.

A statute exempting Building and Loan Associations from the operation of the usury laws. *Simpson vs. Building and Loan Assn.* (Ky.) 41 S. W. Rep. 570.

A statute authorizing a special form of complaint against railroads, in the collection of taxes. *People vs. Cent. Pac. Rld. Co.* 83 Cal. 593.

An Act authorizing townships not containing any village to macadamize its roads. *State vs. Township*, (N. J.) 14 Atl. 587.

A law which confers on all cities of a certain class power to improve its streets and assess the cost of the property benefited, but requires the adoption of its provisions by ordinance before becoming operative in such cities. *City of Reading vs. Savage*, 120 Pa. St. 198.

A law requiring a board of road viewers in cities of a certain class to have one lawyer among its members, who shall act thereon in a judicial capacity. *In re Ruan Street*, 132 Pa. St., 257.

In few, if any of the foregoing cases, was the attempted classification as illusory as the classification attempted in this case.

If this law had stopped with the creation of a special assessor and had remitted him to the performance of his duties under the general law, and if the transmutations of the taxable property of the Territory were such as to call for separate provisions for property acquiring a situs after the ordinary date of assessment had passed, had charged all the assessors in the Territory with the same duties with respect to the assessment of such property, taxed it all, and taxed it all alike, it would be open to no other question than whether the property located

in these reservations is taxable; but when the law goes beyond that point—limits regular assessors to a common schedule of values, the quotient of their common judgment, and requires the special assessor to act independently of that standard, imposes safeguards against oppression on the regular assessors by making their assessment a personal transaction with each individual taxpayer, and giving such taxpayer the primary right to make a list and valuation of his own property, unimpeachable, without notice, and obliterates these safeguards as against such special assessor, taxes the property under the hand of such special assessor at a later date and at a higher valuation, exempting all a part of the time and a favored part all of the time of the property which finds a situs in the organized portion of the Territory during the intervening period. Granting the right to the taxpayers of each regular assessment district to complain as a class before a board of equalization, and bring their rate of valuation into harmony with that imposed in the other assessment districts and denying this right to the taxpayers assessed by such special assessor, who need it most, the special assessor being a stranger to the adoption of the common standard and the persons assessed, nor of their selection, and gives to such taxpayers the right to complain only as individuals to a different tribunal, is manifestly a law conceived in a spirit of unfairness, enacted with the purpose of making an unfavored class to be governed by one rule and the mass of the community, who made the law, by another.

## VII.

**That the thirty-five per cent. added to the assessed value of the property by order of the Territorial Board of Equalization is unauthorized and void.**

The petition in the case alleges that the action of the Territorial Board of Equalization in raising the valuation of the property of these plaintiffs, and the action of the county clerk in extending the same, and such raised valuation on the tax books of said county against these plaintiffs is null and void in this, to-wit (see record, p. 13):

*First.* That said Board has no power or jurisdiction to alter the assessment of property made or attempted to be made in such unorganized territory and reservations attached to the counties of the Territory of Oklahoma for judicial purposes.

*Second.* Because the attempted raise so made by said Territorial Board of Equalization, was not an equalization, but was an attempt upon the part of said Territorial Board of Equalization to make an assessment which they thought would conform nearer to the value of the property in said Territory than that made by the local assessor; that the Territorial Board of Equalization raised the aggregate valuation of all of the counties in said Territory, except the County of Kingfisher, which they permitted to remain in the aggregate as returned to said Board by the County Clerk of said county, and adopted the rate of valuation in Kingfisher County as their standard of valuation of all of the counties of the Territory and raised the aggregate valuation of the other



counties from five to seventy-five per cent. to bring the valuation up to what they considered to be the standard adopted in said Kingfisher County, and which action on the part of said Territorial Board of Equalization the said plaintiffs allege to be wholly unauthorized and void.

We contend that the action of the Territorial Board of Equalization, in raising the valuation of the property of these plaintiffs thirty-five per cent., was an attempt on the part of the Territorial board to make a new assessment, and that if these plaintiffs are liable for taxation at all they are only liable upon the valuations as returned by the special assessor appointed under said Act. Mr. Justice Tarsney, in the opinion (record, p. 43) disposes of this question as follows:

"The final proposition contained in plaintiff's brief, that relating to the action of the Territorial Board of Equalization in raising the aggregate valuations of property returned from the County of Kay for the year 1895, have been fully considered and determined by this Court at this term in the case of *Wallace vs. Bullen*, held adversely to the contention of the plaintiffs herein, fully disposes of this point."

The case of *Wallace vs. Bullen*, referred to by Justice Tarsney, has never been published, but for the information of the Court we have procured and file herewith the opinion in manuscript. The case is still pending on motion for rehearing. It has, however, practically been overruled by the Supreme Court of the Territory by a decision rendered September 3, 1897, in the case of *Gray vs. Stiles*, 49 Pac. Rep. 1083, being pamphlet number 14, published September 30, 1897, in which case Justice McAtee, Justice Keaton and Justice Bierer each

write an opinion. We are content to permit this phase of the case to rest upon the opinion of the Court in the case of *Gray vs. Stiles* and the authorities cited. If the other points urged in this brief are well taken, it may not be necessary to pass upon this question to determine the case. If, however, the Court would consider and decide this proposition, it would decide a question of great importance to the Territory and would settle a question grievously affecting the finances of the Territory and the validity of municipal obligations in the Territory under constitutional limitations, and we apprehend that all of the parties to this controversy will unite in asking the Court to decide this question.

The rule so often announced in this Court as a principle of equitable relief, that the Court will not entertain a bill to enjoin the collection of taxes, unless those found to be due shall be tendered and paid before the commencement of the proceeding, can have no application to the partial relief demanded under this assignment of error in this brief, because by the agreement of the parties entered into in open court, in the trial Court, the relief should be granted in whole or in part as the facts warrant, and because, under Paragraph 5571 of the Revised Statutes of the Territory, where the taxes are all in dispute, the payment of those found to be due, or even admitted to be due, is a condition of the decree and not required to be paid or tendered before suit brought.

### CONCLUSION.

We think the several points raised in this brief urged against the validity of these taxes are sufficient to show that the Legislature in the first place has no authority to

enact legislation and make the same applicable to these Indian reservations, and that if such power were full and complete, the legislation complained of is clearly in violation of the Organic Act of the Territory; in violation of the Acts of Congress applicable to the Territory, an improper delegation of legislative powers to the Supreme Court of the Territory; for all of which reasons we contend that the Act is void, and we respectfully submit that all of the taxes complained of should be declared illegal and void.

HENRY E. ASP and  
JOHN W. SHARTEL,  
*Attorneys for Cross-Appellants.*

## APPENDIX.

### Statutes of the Territory Cited in the Foregoing Brief.

#### ARTICLE 6.—PROPERTY TAXABLE IN TERRITORY ATTACHED FOR JUDICIAL PURPOSES.

AN ACT to Amend Section 13, Article 2, of Chapter 70, of Oklahoma Statutes Relating to Revenue.

*Be it enacted by the Legislative Assembly of the Territory of Oklahoma:*

SECTION 1. That section 13, article 2, chapter 70, of the Oklahoma Statutes relating to revenue, be and the same is hereby amended so as to read as follows. Section 13. That when any cattle are kept or grazed, or any other personal property is situated in any unorganized country, district or reservation of this Territory, then such property shall be subject to taxation in the organized county to which said country, district or reservation is attached for judicial purposes, and the board of county commissioners of the organized county or counties to which such unorganized country, district or reservation is attached, shall appoint a special assessor each year, whose duty it shall be to assess such property thus situated or kept; such special assessor shall have all the powers and be required to perform all the duties of a township assessor, and shall give a similar bond and take the same oath as required of such township assessor, and receive the same fees as a township assessor, and the officer whose duty it shall be to collect the taxes in the organized county to which such country, district or reservation is attached shall collect the taxes and is vested with all the powers which he may exercise in the organized county, and his official bond shall cover such taxes

The assessor herein provided for shall begin and perform his duties between the first day of April and the twenty-fifth day of May in each year, and complete his duties and return his tax lists on or before June 1st, and said property herein authorized to be assessed shall be valued as of May 1st in each year. That in case said property at any time has by oversight or negligence or for any other cause, been irregularly, illegally, or defectively assessed, it shall be lawful for the special assessor to assess or reassess the same, as the case may be, and when done the same shall be valid for all intents and purposes, and in performing his duties under this section, he may make out his assessment rolls or lists from the best evidence attainable. Any person who feels aggrieved by his assessment in any such country, district or reservation, may appear before the board of county commissioners for the organized county to which such country, district or reservation is attached for judicial purposes, at their session commencing on the first Monday in June, and the board of county commissioners shall have power to correct any and all errors and equalize individual assessments: *Provided*, That the assessed valuation of such attached territory shall in no case be taken as a basis for the creation of a bonded indebtedness of the county to which it is attached, or in estimating or limiting the same.

SECTION 2. This act shall take effect and be in force from and after its passage and approval.

Approved March 5, 1895.

#### ARTICLE 5—TAXATION OF TRANSIENT PROPERTY.

AN ACT providing for the Assessment and Taxation of Property in Certain Cases.

*Be it enacted by the Legislative Assembly of the Territory of Oklahoma:*

SECTION 1. When any personal property shall be located in any county of this Territory after the first day

of March of any year, which shall acquire an actual situs therein, before the first day of September, such property is taxable therein for that year and shall be assessed and placed on the tax roll, and the tax collected as provided by this act.

SECTION 2. Whenever any live stock shall be located in this Territory for the purpose of grazing, it shall be deemed to have acquired an actual situs therein as contemplated by this act.

SECTION 3. When any person, association or corporation shall settle or organize in any county in this Territory, and bring personal property therein after the first day of March and prior to the first day of September, in any year, it shall be the duty of the assessors to list and return such property for taxation that year, unless the owner thereof shall show to the assessor, under oath, that the same property has been listed for taxation on that year in some other state, or county in this Territory. If such property is brought within any county after the assessor has made his returns for that year to the county clerk the assessor shall at once assess such property and return the same to the county clerk, if the tax rolls be still in his hands, and after that to the county treasurer, and the same shall be entered on the tax books and collected as in other cases. If there be no assessor, then any township trustee or member of any city or town council where the property is located may make and return the assessments with like force and effect as though made by the assessor. The persons so assessed shall have the right, if assessed after the third Monday in April, to appear before the township or city board of equalization at any time before the taxes become due, and his taxes shall be equalized as provided by law in section 5620 of the statutes of 1893.

SECTION 4. If any person in this Territory, after his personal property is assessed and before the tax thereon



is paid, shall sell all the same to any one person, and not retain sufficient to pay the taxes thereon, the tax for that year shall be a lien thereon, or if such property is about to be sold at auction, or sold at cost, then in either of such events the tax thereon shall at once become due payable, and the county treasurer shall at once become due and payable, and the county treasurer shall at once issue a tax warrant for the collection thereon, and the sheriff shall forthwith collect it as in other cases. The one owing such tax shall be civilly liable to any purchaser of such property for any tax he owes thereon, but the property so purchased shall be liable in the hands of the purchasers for such tax: *Provided, however*, if the property be sold in the ordinary course of retail trade, it shall not be so liable in the hands of the purchasers.

SECTION 5. If the property of any taxpayer be so seized by attachment as to take all property liable to execution, without leaving a sufficient amount of property exempt from levy and sale to pay taxes, then the tax on the property of such taxpayer shall at once fall due and be paid from the proceeds of the sale of attached property in preference to all other claims against it.

SECTION 6. When any person is about to remove his property from the county after the same has been assessed and before the taxes thereon have been paid without leaving sufficient remaining for the payment of the taxes thereon, the tax shall at once become due and payable, and the treasurer shall issue a tax warrant for the collection of the same, and it shall be enforced as in other cases.

SECTION 7. \* \* \*

SECTION 8. If property subject to taxation be sold, seized, or attempted to be removed, as in this Act provided, before the assessor has made his return, or before the county clerk has turned over the tax-rolls for that year to the county treasurer, then, if the assessor's books be in his hands, he shall furnish to the county treasurer

the assessment of that person; but if the party has been assessed and the assessor's books be in the hands of the county clerk, then the county clerk shall furnish to the county treasurer the assessment of that person, and the county treasurer shall at once levy on the property so returned to him the percentage of tax levied in that county for the previous year, and collect the same as in this act provided. If the tax books for that year have come into the possession of the county treasurer, then, if such property be not listed therein, the county treasurer shall enter the same on the tax books and levy thereon the same percentage of tax that is levied in that county for that year, and the treasurer shall then collect the taxes so levied as in other cases.

SECTION 9. This act shall be in force and effect after the date of its passage and approval.

Approved March 8, 1895.

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#### COUNCIL JOINT RESOLUTION No. 16.

*Be it Resolved by the Legislative Assembly of the Territory of Oklahoma:*

That in case the Legislative Assembly fails to enact legislation governing the leasing of lands subject to lease in this Territory, the present board having control of leasing of public lands be, and are hereby, authorized to continue the leasing of such public lands: *Provided, also,* They are authorized to lease lands lying west of range 14, in such quantities as in their judgment may be most advantageous to the public interest.

Approved March 8, 1895.

## CHAPTER II.

## HERD LAW PROVISIONS.

AN ACT to Amend Section 31, of Article 2, of Chapter 2, of the Statutes of Oklahoma, 1893, entitled: "An Act to Regulate and Restrain the Running at Large of Domestic Animals and to provide for Fencing Against Them."

*Be it enacted by the Legislative Assembly of the Territory of Oklahoma:*

SECTION 1. That section 31, of article 2, of chapter 2, of the Statutes of Oklahoma, of 1883, be amended to read as follows: Section 31. It is hereby declared that the provisions of this Act in regard to restraining stock shall not apply to all that part of Oklahoma lying west of a line beginning at a point on the south line of Washita County, where the east line of range seventeen (17) intersects the aforesaid south line; thence north, along said east line to township twenty-one (21), of Woods County; thence east, to the east line of range fifteen (15) west; thence north, along said line to the Cimarron river; thence following the meanderings of said Cimarron river to the east line of range seventeen (17) west; thence north, to township 26 north; thence east, to range 14; thence north to the Kansas line; and the same is hereby declared a free range country: *Provided, however*, That the people of such country may, by petitions hereinbefore provided for, have the privilege of voting on the restraining of stock, and the result of said vote remain in force and effect for a period of five years: *Provided, further*, That any person or persons occupying or using any school, college, or public building or indemnity lands in this Territory, not having leased the same, shall be guilty of a misdemeanor, and, on conviction, be fined not less than fifty dollars, nor more than one hundred dollars for each and every offense.

SECTION 2. This Act shall be in force and effect in each congressional township west of the line fixed by

this Act only at such times as all and the whole of the public school, college, public building, and indemnity lands of any such township are held under lease as provided by law.

SECTION 3. All acts and and parts of acts in conflict with this Act, are hereby repealed, in so far as they conflict with this act.

SECTION 4. This act shall be in force from and after the adjournment of the present session of this Legislative Assembly.

Approved March 9, 1897.

## CHAPTER LXX.

### REVENUE.

AN ACT to Provide for the Raising and Collecting of Revenue, and Repealing Chapter 75, of the Statutes of Oklahoma, entitled: "Revenue."

#### ARTICLE I—PROPERTY SUBJECT TO TAXATION.

*Be it Enacted by the Legislative Assembly of the Territory of Oklahoma:*

(5577) SECTION 1. All property, whether real or personal, all moneys, notes, credits, or investments in bonds, or stocks owned by joint stock companies or otherwise, of persons residing in this Territory, the property of corporations now existing, or hereafter created, and the property of all banks or banking companies now existing or hereafter created, and of all bankers, shall be subject to taxation, and such property, moneys, credits, investments, in bonds, stocks, joint stock companies or otherwise, or of the value thereof, shall be entered on the list of taxable property for that purpose in the manner prescribed by this act.

(5578) SECTION 2. The following classes of property shall be exempt from taxation, and may be omitted from the list herein required to be given:

First. The property of the United States and of this Territory, including school lands.

Second. The property of a county, incorporated city or village, or school district, when devoted to public use and not held or used for pecuniary profit.

Third. Public grounds, by whomsoever devoted to the public use and including all places set apart for the burial of the dead, except such as are held by any person, company or corporation with a view to profit or for the purpose of speculation in the sale thereof.

Fourth. The engine and implements used for extinguishing of fires with the grounds used exclusively for their buildings and for the the meetings of fire companies.

Fifth. The grounds and buildings of library, scientific, educational, benevolent and religious institutions, colleges or societies, devoted solely to the appropriate objects of these institutions, not exceeding ten acres in extent, and not leased or otherwise used with a view to pecuniary profit.

Sixth. The books, papers, furniture, scientific or other apparatus pertaining to the above institutions and used solely for the purpose above contemplated, and the like property of students in any such institutions used for the purpose of their education.

Seventh. All breaking, wells or fertilizing upon lands upon which final proof has not been made.

Eighth. Family portraits.

Ninth. All food and fuel provided in kind for the use of the family not to exceed provisions for one year's time: *Provided*, That no person for whom a compensation for board or lodging is received or expected shall be considered a member of the family within the intent and meaning of this act.

Tenth. All pensions from the United States or from any of the states of the Union, until paid into the hands of the pensioners.

Eleventh. The polls of all active members in good standing of any regularly organized fire company, not exceeding thirty in number in cities or towns, of more than five hundred inhabitants, and not exceeding fifteen in number in towns or cities of less than five hundred inhabitants: *Provided*, That such fire company actually and in good faith possesses apparatus for the extinguishment of fires, exceeding two hundred and fifty dollars in value, to be determined by the assessor of the proper county.

(5579) § 3. All other property, real or personal, shall be subject to taxation in the manner provided in this act:

First. Lands and lots in towns and villages and cities, including lands bought from or donated by the United States and from the Territory and whether bought on credit or otherwise.

Second. Ferry franchises and toll bridges, which for the purpose of this act are to be considered as real property.

Third. Lands or lots shall be assessed to the owner thereof at their actual cash value on the first day of January of each year, and the owner on that day shall be liable for the tax of that year.

Fourth. Horses and neat cattle, mules and asses, sheep, swine and goats.

Fifth. Stocks or shares in any national or other bank or company incorporated by this territory or any other state or territory of the United States and situated in and transacting business in this Territory.

Sixth. All household furniture; including gold and silver plate, musical instruments, watches and jewelry.

Seventh. All private libraries.

Eighth. All pleasure carriages, stages, hacks, omnibuses and other vehicles for transporting passengers.

Ninth. All wagons, carts, drays, sleighs, and every



other description of vehicle or carriages, and all plows, harrows, reaping and mowing machines, harvesters, steam engines, horse powers, grain threshers, and separators, and all other implements and machinery appurtenant to agricultural labor.

Tenth. Annuities, but not including pensions from the United States or any state of the Union until it is paid into the hands of the pensioner.

Eleventh. All manufacturies, including building-machinery, and materials.

Twelfth. All money, goods, or property and capital employed in merchandising.

Thirteenth. All property, real and personal, within this Territory, in possession of, or under control of, or held for sale by any warehouseman, agent, factor or representative in any capacity of any manufacturer, dealer or other agent of any such manufacturer of, or dealer in agricultural implements or machinery or other goods, wares, or merchandise.

Fourteenth. Personal property of every description belonging to persons, or companies doing freighting or transportation business and belonging wholly or in part to persons within this Territory, for such part as is owned by said person.

Fifteenth. All other property, real or personal, of any kind not including improvements upon government lands, or lots not deeded.

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#### ARTICLE 2.—MANNER OF LISTING PROPERTY.

(5580) § 1. On or before the first day of January of each year, the Territorial Auditor, Treasurer, and Attorney General shall provide for the use of the Assessor, suitable notices and blank forms for the listing and assessments of all property, and such instructions shall be needful to secure full and uniform assessments and re-

turns, and forward the same to the county clerks, and such county clerks shall furnish the assessors with the same together with such a list of all the entered land, in his county or district, subject to taxation. The list of taxable property assessed to each person shall contain:

First. His lands by township, range, and section and any division or part of a section or numbered fractional lot of any section lying in the county in which the list is required. And when such parcel of land is not a congressional division or sub-division it shall be listed and described in some other mode sufficient to identify it.

Second. His town lots naming the town in which they are situated and their proper description by number and block, or otherwise, according to the system of numbering in the town.

Third. His right and title in any ferry franchise, toll bridge or part thereof, by the total and actual cash value of the same.

Fourth. Amount of capital employed in merchandising or manufacturing, including all buildings, machinery and appurtenances thereto.

Fifth. Number of horses.

Sixth. Number of mules and asses.

Seventh. Number of cattle over six months old.

Eighth. Number of sheep and goats over three months old.

Ninth. Number of swine over three months old.

Tenth. Number of carriages and vehicles of every description.

Eleventh. Amount of taxable household furniture and musical instruments.

Twelfth. Amount of stock or shares in any incorporated company, or company not incorporated.

Thirteenth. Amount of property, machinery or merchandise held and controlled as agent or sub-agent of any person, company or corporation.

Fourteenth. All real property sold by any party or corporation under any form or grant or conveyance or contract therefor of which the vendor had or has an inchoate contingent or equitable title, right or claim, and which is in the name, possession or use of any vendee who has voluntarily taken such grant or contracts for such title, right or claim: *Provided*, That nothing herein shall be construed so as to effect or impair any right of a person holding or claiming lands from the United States under the homestead laws.

Fifteenth. All other property not specially enumerated in this section by its actual cash value, except such as is specially exempted by section two of this chapter.

(5581) § 2. The above list of items may be extended at the discretion of the Territorial Auditor, Treasurer and Attorney General or board of county commissioners, so as to obtain such facts as they may deem desirable.

(5582) § 3. The assessor shall in no case commence assessing before the first Monday of February of each year.

(5583) § 4. All taxable property, real and personal, shall be listed and assessed each year in the name of the owner thereof on the first day of February of each year, as soon as practicable on or after the first Monday in February, including all property owned on the first day of February of that year, and in case of stocks of goods, wares and merchandise, and the personal property of banks and banking institutions, including money loans, discounts and credits, the statement shall include the average amount of the same for the preceding year ending on February first. And in order to make the assessment, such assessor shall demand from each person and each person and firm and from the president, cashier, treasurer or managing agent of each corporation, association or company within his county, a statement under oath or affirmation of all the real estate within the county,

and personal property owned by, claimed, or in the use, possession or control of such person, firm, corporation, association or company, whether held by the party sworn, for himself or as agent for another, and shall set out in such sworn statement an itemized account of all classes of property, by this act defined as subject to assessment, by him so held or controlled. If any person, firm, officer or agent shall neglect or refuse, on demand of the assessor, to give under oath or affirmation the statement required by this section, the assessor shall ascertain and estimate from the best information he can obtain, the number, amount and cash value of all the several species of property required, and shall list the same accordingly, and the value so fixed by the assessor, shall not be reduced by the county board of equalization.

(5584) § 5. If the owner of any property not listed by another person shall be absent or unknown to the assessor, he shall ascertain and estimate the value thereof, and if the name of such owner be known to the assessor the property will be assessed in his, her or their name; if unknown to the assessor, the property shall be assessed to "unknown owners." The list shall be signed and sworn to by person making it, and the oath thereto may be administered by the assessor or his deputy, or by any other officer authorized to administer oaths, and shall be certified by him, and the oath may be printed upon the blank form and shall be in substance as follows:

I, A B, do solemnly swear (or affirm), that I have listed above and within, all the lands, town and city lots, personal property, money and credits subject by law to taxation and owned, used, possessed or controlled by me, or by law required to be listed by me for any other person or persons as guardian, husband, parent, trustee, executor, administrator, receiver, accounting officer, partner, factor, bailee or agent, according to the best of my knowledge.

(5585) § 6. In case any person required to render the list under oath fail or refuse to do so, the assessor in order to perform his duty as required in section 1 shall list the property of said person and as a penalty shall add fifty per cent. to the actual value thereof, and he may examine on oath any person whom he supposes to have knowledge in relation to the property required to be listed; and if any such person refuse to testify when so required, he shall forfeit the sum of five dollars, to be recovered in civil action in the name and to the use of the proper county; and the assessor shall make a minute of the names of persons refusing to swear to such list or to testify in relation to property, and shall note the same on the list and return the same to the board of county commissioners.

(5586) § 7. The said statements of persons refusing to swear shall be endorsed with the name of the person whose property is therein listed, and the assessors shall file them in alphabetical order, and return them to the office of the county clerk by the first Monday of May next ensuing, at which time or before he shall also prepare and deliver his assessment roll correctly copied and each page of said roll correctly footed, showing the total number and value of each class of property, and shall carry the total footings of each page to the abstract in in the back of the book and correctly foot the same so it will show the total number and value of each class of property in his township. And no county clerk shall receive said assessment roll until the same is correctly balanced and footed. All property is to be valued to the assessor, by the person whose duty it is to list the same, but the assessor may place a different value on the same if he is satisfied that the value so given is not correct; but in case he raise said assessment, he shall give to the person listing the same a copy of the schedule showing such increase; and the assessor shall seek to have

assessed the same classes of property at a uniform value throughout the county.

(5587) § 8. The assessor shall take and subscribe an oath to be certified by the officer administering it, and attach it to the assessment roll, which oath is to be in substance as follows:

I, A. B., county or township assessor, in and for . . . .  
 . . . . . county, Oklahoma Territory, do solemnly swear or affirm, that the value of all property, moneys and credits, of which a statement has been made and verified by the oath of the person required to list the same, is hereby truly returned as set forth in such statement; that in every case where I have been required to ascertain the amount of value of the property of any person or body corporate, I have diligently and to the best means in my power endeavored to ascertain the true amount of value; and that, as I verily believe, the full value thereof is set forth in the above returns, And that in no case have I knowingly omitted to demand of any person of whom I was required to make it, a statement of the amount and value of his property which he was required by law to list, nor have I connived at any violation or evasion of any of the requirements of the law in relation to the assessment of property for taxation.

(5588) § 9. If any person shall wilfully make or give under oath or affirmation a false list of his, her, or their taxable property, or a false list of the taxable property in the use or possession or under the control of him, her or them, and required by law to be listed by him, her or them, or place a false value thereon, such person shall be deemed guilty of perjury and upon conviction thereof, shall be punished therefor as is by law provided for the punishment of perjury.

(5589) § 10. Every inhabitant of this Territory, of full age and sound mind, unless excepted by the provisions of this act, shall list all property subject to taxa-



tion in this Territory of which he is owner or has the control or management in the manner herein directed, but the property of a ward is to be listed by his guardian; of a minor having no other guardian, by his father if living, if not, then by his mother if living, if not, then by the person having the property in charge; of a married woman, by her husband, but if he be unable or refuse, then by herself; of a beneficiary for whom property is held in trust, by the trustee; and the personal property of a decedent, by the executor, administrator or heirs; of a body corporate, company, society or partnership, by the principal accounting officer, agent or partner; property under mortgage, or leased to be listed by and taxed to the mortgagor or lessor, unless by special contract to be listed by the mortgagee or lessee.

(5590) § 11. Commission merchants and all persons trading or dealing on commission, and consignees authorized to sell, when the owner of the goods does not reside in this Territory, are for the purpose of taxation required to list all the property in their possession.

(5591) § 12. All personal property is to be listed, assessed and taxed in the county where said property may be situated and kept, on the first day of February, and if the owner, his agent or person having in charge such property neglect to list it, he will be subject to the penalty hereinafter provided.

(5592) § 13. When any personal property is situated and kept in any unorganized county of this Territory then such property shall be subject to taxation in the organized county to which it is attached for judicial purposes, and shall be listed and assessed by the assessor of said organized county, and the taxes collected therein.

# ARTICLE 6—COUNTY AND TOWNSHIP BOARDS OF EQUALIZATION.

(5620) § 1. The township assessor, or township clerk, and township treasurer shall compose the board of equalization for each township; the town or city assessor, mayor or president of the board of trustees, and city clerk, shall compose the board of equalization for cities, towns and villages, and said boards shall meet on the third Monday in April of each year to hear all complaints of persons who feel aggrieved by their assessments.

(5621) § 2. The board of county commissioners of each county shall constitute a board, or a majority of the members thereof, shall hold a session of not less than two days at the county seat, commencing on the first Monday of June in each year, for the purpose of equalizing the assessment roll in their county between the different townships.

(5622) § 3. The county clerk of the county shall be clerk of said board of equalization for the county.

## ARTICLE II—ASSESSORS.

AN ACT Relating to Assessors.

*Be it enacted by the Legislative Assembly of the Territory of Oklahoma:*

(6068) § 8. The several township and city assessors shall meet at the county seat of their respective counties on the second Monday of January in each year and agree upon an equal cash basis of valuation of such property as they may be called upon to assess. It shall be the duty of the county clerk of each county to notify said township and city assessors at least ten days previous to the date of such meeting.

IN THE  
**Supreme Court of the United States.**

OCTOBER TERM, 1897.

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A. M. THOMAS *et al.*, as the Board of County  
Commissioners, etc., Appellants,  
*vs.*  
D. P. GAY and A. S. REED, Partners as  
Gay & Reed, *et al.*

No. 287.

AND

D. P. GAY and A. S. REED, Partners as  
Gay & Reed *et al.*, Appellants,  
*vs.*

No. 439.

A. M. THOMAS *et al.*, as the Board of County  
Commissioners, etc.

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APPEALS FROM THE SUPREME COURT OF THE TERRITORY OF  
OKLAHOMA.

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**Brief in support of the contentions of Messrs. Gay &  
Reed et al., denying the power of the Legislature  
of Oklahoma to enact a law providing for the tax-  
ation of cattle upon Indian Reservations, filed by  
leave of the Court and with the consent of Coun-  
sel for Messrs. Gay & Reed.**

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Having obtained the consent of counsel for Messrs.  
Gay & Reed *et al.*, the following brief is, by leave of the

Court, filed for consideration in the above-entitled cases, such permission having been requested because of the fact that many of the questions involved therein have also arisen in certain suits now pending in the courts of Montana to restrain the collection of taxes upon cattle located for grazing purposes upon the reservation of the Crow Indians in that State, under leases similar to those under which the cattle sought to be taxed by the authorities of Oklahoma are grazing upon the Osage and Kansas Reservations in the case at bar, the decision of which latter case would necessarily, in a large measure, determine some if not all of the questions at issue in the Montana cases.

### **Statement.**

The Kaw or Kansas Indian Reservation and the part of the Osage Reservation here involved are within the territorial limits of the Territory of Oklahoma. By an order of the Supreme Court of said Territory, issued in February, 1894, the said Kaw or Kansas Indian Reservation and all of the Osage Reservation north of the township line dividing townships 25 and 26 north were attached to the county of Kay for judicial purposes, which appears to have been done under the authority of section 9 of the organic act of the Territory.

These reservations are entirely without the boundaries of said county of Kay and are not within the boundaries of any organized county, but are within the geographical limits of said Territory, as created and defined by said organic act. They are composed wholly of wild

and unallotted lands, owned and occupied by said Indian tribes and used for grazing purposes, under leases (authorized by act of Congress, as in the Montana case) to Messrs. Gay, Reed, and others by the Osage and Kaw or Kansas tribal governments, approved and ratified by the Commissioner of Indian Affairs and the Secretary of the Interior. None of these lessees are residents of the Territory of Oklahoma.

The act of the Legislative Assembly of said Territory, which is alleged to be invalid, is one that was approved on the 5th of March, 1895, and provides, in substance, that when any cattle are kept and grazed, or any other personal property is situated in any unorganized country, district or reservation of said Territory, such property shall be subject to taxation in the organized county to which such unorganized country, district or reservation is attached for judicial purposes, etc.

In pursuance of said act and in accordance with its further provisions, the county commissioners of said county of Kay, appointed a special assessor to assess all personal property and cattle kept and grazed in the unorganized country and parts of Indian reservations so attached to Kay county for judicial purposes, which assessment was made, and said taxes were levied for territorial purposes by the Territorial Board of Equalization, and for county purposes by the Board of County Commissioners. Before the taxes became delinquent, the cattle owners attempted to remove their respective properties from said reservations, whereupon tax warrants were issued by the treasurer of said county and delivered for

execution to the sheriff, who duly seized a part of said property by virtue thereof.

Afterwards the plaintiffs in error filed separate petitions in the district court of Kay county, praying for injunctions to restrain defendants in error from making any further attempt to collect said taxes, which injunctions were temporarily granted. These petitions were demurred to, and, all the causes being subsequently consolidated, at the hearing of said case the district court sustained the demurrer in part and overruled it in part, holding that all of the taxes levied by the Board of Equalization for territorial purposes and the county levy for court expenses were valid, and as to those levies the injunctions were dissolved, but as to all the other taxes levied by the Board of County Commissioners for county purposes the injunctions were made perpetual. Both parties appealed, and the Supreme Court of the Territory affirmed the decree of the said district court, from which latter decision both parties again appealed to this court.

## **Brief.**

### **I.**

#### **The jurisdiction of the United States over the Osage and Kansas Indians and the lands contained in their respective Reservations.**

At the outset of this brief, we think it important to call attention to the various treaties, statutes and agreements relating to the Osage and Kansas Indians, and



the conditions existing with reference to the reservations in question in this case, both prior and subsequent to the creation of the Territory of Oklahoma, for the purpose of showing that the United States had at the time of the creation of said Territory, and still has, exclusive jurisdiction over said Indians and their lands, and of all matters in any way affecting them, or in which they are interested, and that, therefore, the Legislative Assembly of Oklahoma was without power to enact the law of the 5th of March, 1895, providing for the taxing of cattle grazing upon said reservations under the leases aforesaid.

By a succession of treaties, too numerous here to mention, the Osage and Kansas Indians, who were the aboriginal owners and possessors of vast tracts of land west of the Mississippi River, gradually relinquished portions of the same to the United States until they eventually became located upon and confined within the limits of certain defined reservations in the State of Kansas, large parts of which, as the tribes became reduced in numbers, and as the State became more thickly settled by the whites, were likewise ceded to the United States to be opened up for settlement and resold. The Osages, as will be shown by what follows, were ultimately removed from the State altogether to a tract of country in the northern part of the Indian Territory, which they had originally owned, and which was purchased for their use from the Cherokees, shortly after which the Kansas Indians were also removed from their said reservation and located upon a portion of said land, which they in

turn purchased from the Osages. The details of these latter transactions will appear from the following:

*The Osages.*

On the 26th of June, 1866, a treaty with the Osages, who were then upon their said reservation in Kansas, was ratified by the Senate (*14 Stats., 687*). In articles 1 and 2 of said treaty a large part of their said Kansas lands was sold outright to the Government for a certain sum of money, and a part ceded in trust to be surveyed and sold for their benefit, the proceeds to be placed in the Treasury to their credit. Article 16 of said treaty provides that—

“If said Indians should agree to remove from the State of Kansas and settle on lands to be provided for them by the United States in the Indian Territory, on such terms as may be agreed upon between the United States and the Indian tribes now residing in said Territory, or any of them, then the diminished reservation shall be disposed of by the United States in the same manner and for the same purposes as hereinbefore provided in relation to said trust lands, except that fifty per cent. of the proceeds of the sale of said diminished reserve may be used by the United States in the purchase of lands for a suitable home for said Indians in said Indian Territory.”

Subsequently, in pursuance of said treaty, Congress, in section 12 of an act approved July 15, 1870 (*16 Stats., 335*), provided, in substance, that whenever said Indians (the Osages) should agree thereto, in such manner as the President should prescribe, said Indians should be removed from their said diminished reservation in the

State of Kansas to the lands to be provided for them in the Indian Territory, "to consist of a tract of land in compact form, equal in quantity to 160 acres for each member of said tribe, to be paid for out of the proceeds of the sales of their lands in the State of Kansas." On the 10th of September, 1870, such an agreement was entered into by said Indians with the United States for the purpose of obtaining the signatures of the Indians to which, as appears by the report of the Commissioners of the United States attached thereto, they were promised self-government in their new reservation and exemption from intrusion by the whites.

The land of which this new reservation was composed was obtained from the Cherokees under the treaty with that Nation of July 19, 1866 (*14 Stats., 799, 804*), in which it was stipulated that the United States might "settle friendly Indians in any part of the Cherokee country west of the 96th degree, to be taken in a compact form in quantity not exceeding 160 acres for each member of each of said tribes thus to be settled, the boundaries of each of said districts to be distinctly marked *and the land conveyed in fee simple to each of said tribes, \* \* \** said lands to be paid for to the Cherokee Nation at such price as may be agreed on between the said parties in interest, subject to the approval of the President," etc.; and, in pursuance of said act of 1870 and said agreement, the Osages were established upon their present reservation, and the Cherokees were paid therefor the sum of \$1,650,600. By an act approved June 5, 1872 (*17 Stats., 230*), Congress confirmed this reservation in said Chero-

kee country, defining its limits, and concluding with the following provision :

*"And provided further, That the said Great and Little Osage tribe of Indians shall permit the settlement within the limits of said tract of land of the Kansas tribe of Indians, the lands so settled and occupied by said Kansas Indians, not exceeding 160 acres for each member of said tribe, to be paid for by said tribe of Indians out of the proceeds of the sale of their said lands in Kansas, at a price not exceeding that paid by the Great and Little Osage Indians to the Cherokee Nation of Indians."*

Thereafter, in the deficiency appropriation act of March 3, 1873 (*17 Stats., 530*), Congress authorized and directed the Secretary of the Interior to transfer from the proceeds of the sale of the Osage lands in Kansas the said sum of \$1,650,600 to pay for the lands so purchased by the Osages from the Cherokees, and in 1883, sufficient money having been realized from such sales to pay for said land, a deed was duly executed by the Cherokees conveying all their rights and title in and to the same to the United States for the use of the said Osage and Kansas Indians, which deed is recorded in Vol. 6 of the Indian Deeds in the office of the Commissioner of Indian Affairs in the Department of the Interior, and see, also, Report of the Commissioner of Indian Affairs for 1883, page 203.

*The Kaw or Kansas Indians.*

As in the case of the Osages, the Kaw or Kansas Indians (and to avoid confusion we will hereinafter refer to these Indians as the "Kansas" Indians only, the name "Kaw" being merely a corruption of the word "Kansas")

had been residing upon their diminished reservation in the State of Kansas, the limits of which were established by the treaty of 1860 (*12 Stats., 1111*), the remainder of their original country having been stipulated in said treaty to be sold, the proceeds thereof to be expended for the benefit of said Indians and in the payment of their debts.

Thereafter Congress passed an act, approved May 8, 1872 (*17 Stats., 85*), providing, among other things, that the unsold lands of said Indians in Kansas be sold, the proceeds to be applied to the payment of their liquidated indebtedness, and the excess, if any, to be distributed to the Indians *per capita* in money. Then follows a provision similar to that in the case of the Osages, in these words:

"If the Kansas tribe of Indians shall signify to the President of the United States their desire to sell their diminished reserve, as indicated in said treaty, including lands held in severalty and in common, and to remove from the State of Kansas, and shall so agree in such manner as the President may prescribe, the Secretary of the Interior may cause the same to be appraised \* \* \* and sold \* \* \* and the proceeds of said sales shall belong to said tribe in common, fifty per centum of which shall be placed to their credit on the books of the Treasury \* \* \* and the remaining fifty per centum of the proceeds of sales as aforesaid, shall be used in providing and improving for them new homes in the Indian Territory, and in subsisting them until they may become self-sustaining."

Then, upon their agreeing so to remove, the provision above quoted was made by Congress in the act of the

5th of June, 1872 (17 *Stats.*, 230), for the location of said Kansas Indians on the lands of the Osages in the Indian Territory, which had been purchased from the Cherokees, and which lands of the Kansas Indians were to be paid for out of the proceeds of the sale of their lands in Kansas. Pursuant to said acts of Congress and said agreement, a tract of land containing 100,157.32 acres was purchased and set apart for the use of these Kansas Indians in the northwestern part of said Osage Reservation, for which they paid to the Osages, out of the sale of their diminished Reservation in Kansas, the sum of \$70,096.12.

*The Cherokee Title.*

The title of the Cherokee Nation to the tract of country of which the present Osage and Kansas Reservations form a part was considered by this Court in the case of *Holden v. Joy* (17 Wall., 211), and it was there held, among other things, that "Indian tribes are capable of taking as owners in fee-simple lands by purchase where the United States in form, and for a valuable and adequate consideration, so sell to them," and that the Cherokee lands were conveyed to them in fee. Justice Clifford, in the opinion, recites the historical facts which led to the acquiring of these lands by the Cherokees, as follows:

"Disturbances, and in some instances collisions, of a threatening character occurred between the Cherokee Nation of Indians and certain citizens of the States or Territories in which they resided, in consequence of which the United States and the



Cherokee Nation became anxious to make some arrangement whereby the difficulties which had arisen by the residence of the Indians within the settled parts of the United States or territorial governments might be terminated and adjusted. Measures of various kinds had been devised and tried without effectually accomplishing the object, as will be seen by reference to some of the early treaties with that nation and the acts of Congress upon the subject.

"Treaties of the kind were concluded with that nation of Indians on the 6th of May, 1828, and on the 14th of February, 1833, in both of which the United States agreed to possess the Cherokees of seven million acres of land west of the Mississippi river, bounded as therein described, and to guarantee it to them forever, upon the terms and conditions therein stipulated and agreed. Enough appears in those treaties to show that it was the policy of the United States to induce the Indians of that nation resident in any of the States or organized Territories of the United States to surrender their lands and possessions to the United States and emigrate and settle in the territory provided for them in those treaties. Sufficient is known, as matter of history, to justify the remark that those measures, as well as some of like kind of an earlier date, were unsuccessful, and that the difficulties continued and became more and more embarrassing. *Cherokee Nation v. Georgia*, 5 Pet., 15; *Worcester v. Georgia*, 6 *id.*, 515.

"Prior measures having failed to accomplish the object of quieting the disturbances or removing the difficulties, the United States, on the 20th of December, 1835, concluded a new treaty with the Cherokee Nation, with a view to reunite their people into one body and to secure to them a permanent home for themselves and their posterity in the country selected for that purpose, without the territorial limits of the State sovereignties, and where they could establish and enjoy a government of their

choice and perpetuate such state of society as might be consonant with their views, habits, and condition. \* \* \*

"Even treaties proved ineffectual, as one after another failed to accomplish the desired end. They would not emigrate without compensation for their improvements, and many were reluctant to accept any of the terms proposed upon the ground that the quantity of land set apart for the accommodation of the whole nation was not sufficient for the purpose. Twice the United States offered the seven million acres of land, with other inducements, but the terms, though formally accepted, did not have the effect to accomplish the end. Experience showed that better terms were required, and the Government agreed to purchase their lands for the consideration named in the treaty and to convey to the Indians in fee-simple title the additional tract of 800,000 acres."

After further remarking that the lands east of the Mississippi that were conveyed to the United States by the treaty of 1835 had been held by the Cherokees under their aboriginal title, acquired by immemorial possession, and that, therefore, they were competent to make the sale to the United States and to purchase the lands agreed to be conveyed to them ; and, further, that as the United States had, by the treaty of 1825, acquired the lands so conveyed to the Cherokees west of the Mississippi from the Osage Indians, it was clearly competent for the proper authorities of the United States to convey the same to the Cherokee Nation, the Court says that on the 1st of December, 1838, a patent for the land promised was (and which included the lands conveyed by the treaties of 1828 and 1833) issued by the President in full execution of the second and third articles of the treaty.

In the treaty with the Cherokees of the 6th of May, 1828 (*7 Stats., 311*), referred to by the Court in the above quotation, the intention of the Government and of the Indians that said Nation was to hold said lands absolutely, and that they were never to be embraced within the limits or jurisdiction of a State or Territory, was fully expressed. It is there asserted that it is—

“The anxious desire of the Government of the United States to secure to the Cherokee Nation of Indians, as well those now living within the limits of the Territory of Arkansas as those of their friends and brothers who reside in States east of the Mississippi and who may wish to join their brothers in the West, a permanent home, and which shall, under the most solemn guarantee of the United States, be and remain theirs forever—a home that shall never, in all future time, be embarrassed by having extended around it the lines, or placed over it the jurisdiction of a Territory or State, nor be pressed upon by the extension, in any way, of the limits of any existing Territory or State.”

In Article 3 of said treaty of December 29, 1835 (*7 Stats., 478*), with the Cherokees, it is provided that the lands ceded to said Indians by the treaties of 1828 and 1833, including the lands ceded by the said treaty of 1835, shall be conveyed to the Indians in one patent; and in Article 5 it is provided that these lands shall not, at any future time, be “included within the territorial limits or jurisdiction of any State or Territory” without the consent of the Indians.

**The title to the lands in question purchased by the Osage and Kansas Indians is the same as that theretofore held by the Cherokees, and all rights of exclusive jurisdiction thereover and exemption from the interference or control of any Territory or State passed to the Osage and Kansas Indians by virtue of said purchase.**

This is the title that was conveyed to the Osage and Kansas Indians (or to the United States for their use, by the deed above referred to under the authority of the various acts and treaties set forth herein. In none of the subsequent treaties or statutes that we have been able to find have either the Cherokees or the Osage and Kansas Indians consented that the lands here in question should be included within the limits or jurisdiction of the Territory of Oklahoma; and, as it is an historical fact that the Osage and Kansas Indians were removed from the State of Kansas for practically the same reasons that induced the removal of the Cherokees from the States east of the Mississippi, it must be presumed that it was the intention of all the parties at the time of their removal that these Osage and Kansas Indians were to have the same rights in the land purchased by them that were possessed by the Cherokees at the time of such purchase.

It is obvious that as said treaties provide that *the lands therein designated* (not any other lands that might be at any time owned by the Cherokees) should never be embraced within the limits of a Territory or State without the consent of said Indians, the exemption thereby

created, or the right of the Indian owners to avail themselves of such exemption *is a right that runs with the land* subject to which said lands, or any part thereof, could be conveyed to other Indians, and is not a right pertaining alone to the Cherokees, which ceased to exist when the ownership of the Cherokees therein terminated. Therefore, said right, if not relinquished by the Cherokees prior to the execution of said deed passed to the United States for the use of the Osage and Kansas Indians, upon their purchase of said lands, and can not be extinguished by the United States until the consent of said Indians is obtained.

Congress, however, in the act creating the Territory of Oklahoma, has included these Osage and Kansas lands within the geographical limits of said Territory ; but, as will appear from what follows, was careful to reserve to the United States exclusive jurisdiction over said lands and their occupants, and to provide against the impairment of any of the personal or property rights of the Indians included in said Territory, as secured to them by their treaties and agreements and the statutes of the United States.

#### *The Organic Act.*

Having thus seen what were the rights and title of the Indians in and to the lands here in question, and the jurisdiction of the United States over themselves and their lands prior to the passage of the act creating the Territory of Oklahoma, we now turn to said act for the purpose of seeing whether, by the provision thereof, any

of this jurisdiction or authority of the United State or these rights of the Indians were thereby relinquished or conferred upon the Legislature of said Territory. In the first section of said act, which was passed on the 2d of May, 1890 (*26 Stats.*, 81), it is provided that—

“Nothing in this act shall be construed to impair any right now pertaining to any Indians or Indian tribe in said Territory under the laws, agreements, and treaties of the United States, or to impair the rights of person or property pertaining to said Indians, or to affect the authority of the Government of the United States to make any regulation or to make any law respecting said Indians, their lands, property, or other rights which it would have been competent to make or enact if this act had not been passed.”

One of these rights, conferred upon the Indians by Congress in the exercise of this retained jurisdiction and authority over said Indians and their lands, is the right to lease the unoccupied portions of their reservations to cattle owners for grazing purposes, it being provided in section 3 of the act of February 28, 1891 (*26 Stats.*, 794), that—

“Where lands are occupied by Indians who have bought and paid for the same, and which lands are not needed for farming or agricultural purposes, and are not desired for individual allotments, the same may be leased by authority of the Council speaking for such Indians, for a period not to exceed five years for grazing or ten years for mining purposes, in such quantities and upon such terms and conditions as the agent in charge of such reservation may recommend, subject to the approval of the Secretary of the Interior.”



**The provisions of the foregoing treaties, agreements, and acts of Congress should receive a liberal construction, and all doubts arising thereunder should be resolved in favor of the Indians.**

This Court, as will be seen by the cases to which we shall hereinafter refer, has uniformly in its decisions recognized the principle that where there is a clause in a treaty with an Indian tribe or nation, providing that their lands shall never be included within the limits or jurisdiction of any State or Territory without their consent, the jurisdiction of the United States over all persons and property, whether belonging to Indians or not, within the Indian reservation is *absolute*, and consequently no State or Territory, or any county thereof, contiguous to such reservation, or within the geographical limits of which such reservation is situated, could tax the property of persons other than Indians located upon said reservation for any purpose whatsoever, whether the Indians were in any way interested in said property or not.

This being so, we respectfully submit that if this court has any doubt about the fact that these Osage and Kansas reservations are excepted from the jurisdiction of the Territory of Oklahoma by the treaties and statutes above set forth, and by the provision of the organic act of the Territory which we have above quoted, that doubt should be resolved in favor of the Indians. We will hereinafter, we think, conclusively demonstrate that the

Indians themselves are deeply and pecuniarily interested in the property upon which these taxes are sought to be collected, and that said taxation is not a matter in which they are in no way concerned, as contended by counsel for the taxing authorities, but it is sufficient for the purposes of this branch of the discussion to say that should the decision of the Court below be allowed to stand, these Indians would be deprived of substantial rights and benefits derived from the leasing of their land which are secured to them by said treaties and agreements, and by the provisions of said organic act.

In the case of the *United States v. Kagama* (118 U. S., 375), this Court, on pages 383 and 384, defines the attitude of the United States towards the Indian tribes as follows :

“ These Indian tribes are the wards of the nation. They are communities dependent on the United States—dependent largely for their daily food, dependent for their political rights. *They owe no allegiance to the States, and receive from them no protection.* Because of the local ill feeling the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this Court, whenever the question has arisen.”

After citing and stating the substance of the decisions in the cases of *Worcester v. Georgia* (6 Pet., 515); *Fellows v. Blackman* (19 How., 366), the *Kansas Indians* (5 Wall.,

797), and the *New York Indians* (5 Wall., 761), the Court proceeds :

“The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.”

The principle for which we are now contending, namely, that the language used in treaties with the Indians should never be construed against them and so as to subvert rights supposed and intended to exist thereunder, is stated in the case of the *Choctaw Nation v. The United States* (119 U. S., 27-8), where the court quotes with approval what we have above quoted from the case of *Kagama*, and also quotes the following from *Worcester v. Georgia* (6 Pet., 515, 582) :

“The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. *How the words of the treaty were understood by this unlettered people rather than their critical meaning should form the rule of construction.*”

If this be so with relation to treaties, upon precisely the same principle should all agreements and dealings

of every description with this unlettered and helpless people by which they are led to part with their lands, and all statutes enacted as a result of such agreements and dealings, be construed in favor of the rights of person and property supposed by the Indians to exist at the time of such transactions, and not to be surrendered as a consequence thereof.

In this case there can be no doubt, and it is a part of the history of this country, that it was the general policy of the United States, and was so understood by the various tribes of Indians that were removed from the States at the time of the removal of the Indians in question that they should be located upon tracts of country entirely without the limits or jurisdiction of any State or Territory so long as they should maintain their tribal relations and hold their lands in common. It was understood that they should be removed to a section of country in the Indian Territory where they would be wholly under the control and jurisdiction of the United States, and where they would be perfectly free from intrusion of, and possibility of conflict with, the whites.

In conformity with this policy, said Indians were located upon lands in the Indian Territory that were paid for with their own money, derived from the sale of their lands in Kansas, located upon lands in relation to which it had been expressly stipulated in the treaties referred to that they were not, without the consent of their owners, to be included within the limits or jurisdiction of any State or Territory. No such consent was ever given, either by the former owners (the Cherokees)

in the deed of conveyance above referred to, or otherwise, or by the present equitable owners (the Osage and Kansas Indians) in any subsequent treaty or agreement.

It is, therefore, obvious that in accordance with the attitude toward the Indians of the United States above defined by this Court, this principle should be applied to the transaction in question in the present case, and that these Indians should be allowed to hold their lands and their property, and everything pertaining thereto, under the laws of the United States, and that they should be protected from interference therewith by the Territory of Oklahoma, and all other States and Territories of the United States whatsoever.

Counsel for the taxing authorities, however, assert that in the absence of stipulations in the treaties with the *Kansas* and *Osage Indians*, providing that the lands at present held by them shall never be included within the limits or jurisdiction of a State or Territory, personal property, other than that of Indians, situated upon said reservations, is taxable to the same extent and for the same purposes as personal property of white citizens in any other part of the Territory.

In asserting this proposition, counsel, of course, assume that as no such stipulations appear in the treaties with the *Kansas* and *Osage Indians* themselves, no exemption of the character above described exists with reference to their lands, and that, therefore, when their reservations were included within the geographical limits of Oklahoma by the act of the 2d of May, 1890, creating said Territory, only the rights of person and

property pertaining strictly to the Indians were excluded from the jurisdiction of the Territory.

Aside from the fact (as we will hereinafter show) that the Indians *are* actually interested in the property sought to be taxed, we do not think the cases cited by counsel from this Court sustain their contention. We do, however, admit that there is a conflict in the decisions of the courts upon this question as to whether property of persons, other than Indians, upon Indian reservations can be taxed for Territorial or State purposes, and many cases might be cited on both sides. For example, the decision of the Circuit Court of Appeals in the case of *Truscott v. The Hurlbut Land and Cattle Company* (19 C. C. A., 374) is in favor of such a tax upon cattle grazing upon the reservation of the Crows in Montana, while the decision of the Court in *United States v. Partello* (48 Fed. Rep., 670) is against the jurisdiction of Montana, exercised for *any* purpose, even to punish crimes committed by white persons upon the same reservation. So, also in the case of *Ewing* (47 Fed. Rep., 813). But there has been as yet no decision of this question by this Court.

The two cases from this Court, cited by counsel, to the above propositions are the cases of the *Utah and Northern Ry. Co. v. Fisher* (116 U. S., 28) and *Maricopa and Phoenix Railroad Co. v. Arizona* (156 U. S., 347). In the case of *Utah and Northern Ry. v. Fisher* there was levied under the laws of the Territory of Idaho, for territorial and county purposes, a tax upon said railroad, its depots and other property, within the Fort Hall Indian Reser-



vation. The railroad attempted to enjoin its collection on the ground that the reservation was excluded from the limits of Idaho by the act creating the Territory, which provided, in substance, that nothing therein contained should be construed to impair the existing rights of Indians in Idaho so long as they should remain unextinguished by treaty, or to include within the boundaries or jurisdiction of said Territory any lands which by treaty with the Indian tribes were not without their consent to be included within the limits or jurisdiction of any State or Territory, or to affect the authority of the United States to make any regulations respecting the Indians, their lands, property, or their rights, etc., which it would have been competent for the Government to make if the act had not been passed.

The Court held that at the time of the creation of the Territory there was no treaty with the Indians stipulating that the lands which might be reserved to them should be excluded from the limits or jurisdiction of any State or Territory, and that the clause of the proviso in said act on that head had therefore no application. The Indians having ceded to the United States, for \$6,000, a strip of land and several parcels adjoining it, to be used by the railroad as a road-bed and for stations and other structures, said land was held, *by force of this cession, to be withdrawn from the reservation*, and it was for that reason that the Court held that it became subject to the laws of the Territory relating to railroads. There is therefore manifestly no analogy between this case and the case at bar, as in the case at bar the Indians have

not parted with their ownership of the lands occupied by the cattle sought to be taxed, but the lands are still a part of the reservations in question, and still subject to the jurisdiction of the United States.

The case of the *Maricopa and Phoenix Railroad Co. v. Arizona* (156 U. S. 347), is almost precisely the same as the case of the Utah and Northern Railway, just referred to. The lands granted to the railroad through the Indian reservation there in question were held to have been *withdrawn*, the consequence of which was to re-establish the dominion of the territorial authority thereover, the reservation being within its limits.

There have been many other cases in this Court not cited by counsel, in which the question of the jurisdiction of territorial and State governments over Indian reservations has been considered, most of which relate to the service of process or the right of a State or Territory to punish crimes committed upon such reservations by white men, and none of which relate to the taxation of property (see *Harkness v. Hyde*, 98 U. S., 476; *U. S. v. McBratney*, 104 U. S., 621; *Langford v. Monteith*, 112 U. S., 45; *Ex parte Crow Dog*, 109 U. S., 556; *U. S. v. Kagama*, *supra*; *U. S. v. Pridgeon*, 153 U. S., 48, and *Draper v. The United States*, decided at the last term of this Court, 164 U. S., 244), but none of those cases, so far as we can see, have any application to the case at bar.

In the event, however, that the Court should not agree with us in the view of this case which we have above presented, and should hold that the treaties, agreements, and statutes hereinbefore set forth do not have the effect

of excluding the reservations in question, and all persons and property lawfully therein, from all jurisdiction thereover, of every kind and description, by the Territory of Oklahoma, we desire to call the attention of the Court to several other propositions which, we think, are conclusive of this question, whether, even if persons and property belonging to others than Indians upon these reservations are subject to the jurisdiction of said Territory for some purposes, the act providing for the taxation of said cattle is illegal, and to these propositions we now turn.

## II.

**The taxation of cattle located for grazing purposes upon the reservations in question in this case, under leases duly authorized by act of Congress, is a violation of the rights of the Indians and an invasion of the jurisdiction and control of the United States over them and their lands—this irrespective of the question whether said lands are, by the treaties, etc., above referred to, excluded from the limits and jurisdiction of the Territory of Oklahoma.**

The contention of our adversaries with reference to this branch of the case seems to be that, as the cattle upon these reservations do not belong to the Indians themselves, but to white persons who do not reside upon said reservations and have no connection with the Indians whatever, the Indians are, therefore, in no way interested in said cattle or in the disposal thereof, and the Territory and the county to which said lands are at-

tached for judicial purposes have the right to tax said cattle, because, in doing so, they do not interfere with the jurisdiction of the United States over the Indians themselves and their property and lands, or with the rights of said Indians.

From the authorities to which we have already referred it will be seen that it is extremely doubtful whether the territorial or county authorities would have the right to tax property of others than Indians located upon such reservations, even if it could fairly be said that the Indians were not in any way interested in such property and that their rights of person or property could not in any way be affected by such taxation. Indeed, in the only two cases that we have been able to find in which this question of taxation of such property was considered by this Court, namely, the cases of *Railway Company v. Fisher* (116 U. S., 28) and *Railroad v. Arizona* (156 U. S., 347), to which we have already referred, there seems to be a tacit recognition of our contention, as the Court in each of these cases is careful to say that it was because of the fact that the lands upon which the property of the railroad companies was situated were *actually withdrawn* from the reservations that the State or Territorial authorities had the right to tax it.

But we do not think that this latter question becomes important in this case, as it seems to us, for the following reasons, to be perfectly obvious that the Indians are directly and vitally interested in the property sought to be taxed, and that their rights of person and property are seriously affected by said act. Of course, the very object

of leasing these Indian lands is to avoid the payment of taxes upon the cattle located thereon for grazing purposes. The money contracted to be paid for this privilege is paid to the Indians directly, as a tribe, and is used and expended by them for their own purposes, and if, for any reason, the conditions existing at the time the leases were executed were changed, or could be changed by the Legislature of Oklahoma at its pleasure, naturally the value of the lands for such purposes would fluctuate or be destroyed altogether according to such conditions.

It is evidently upon the basis of the supposed exemption of this property from such taxation that the prices charged under these leases are fixed and agreed upon, and as it must, of course, be presumed that the prices charged by the Indians and approved by the Department of the Interior are as high as could be obtained from the cattle-owners under the circumstances that exist at the time the leases are made, it necessarily follows that anything that might occur that would increase the cost to such lessees of grazing their cattle upon said lands would, at least to the extent of the excess of such cost over what lands could be leased for in other localities, decrease the rental value of the lands contained in these reservations. If cattle-owners could obtain the use of lands in the Indian Territory, for instance, where their cattle would be free from such taxation, for the same price that they could be obtained for in the reservation in Oklahoma, the question of taxation would, of course, be taken into consideration: and, other things being equal, the lands in the Indian Territory would be leased, and the Osage

and Kansas Indians deprived of the considerable income derived from this source, which appears to be about the only means provided by law by which the Indians can derive an income from the use of their unoccupied and otherwise unused lands.

This being so, the taxation of such cattle (which, as we have seen, are the means or instrumentality by which the Indians derive an income from their unoccupied lands, and of which they would be deprived altogether if such grazing privilege should be made so expensive that the cattle-owners could not afford to lease them), is necessarily a servitude upon the land itself, which, of course, the Territory of Oklahoma has no right to impose.

All the authorities that we have been able to find including those above cited, recognize the fact that the Territory would have no power or authority to tax any portion of the land itself, nor would it have the power to tax the personal property of said Indians—in other words, the income derived from said lands, and if it could not do this, it could not, of course, legally enforce the collection of a tax which, although not so providing in terms, nevertheless accomplishes the same thing. *It is the substance and not the form which controls*, as has been established by repeated decisions of this Court. (157 U. S., 580.)

We therefore submit that the Territory of Oklahoma can not do in this indirect way what it could not do directly; and, in this connection, refer to the case of *Pol-*



*lock v. Farmers' Loan and Trust Company* (157 U. S., 429), known as the "income tax case," the principles enunciated in which are so familiar that it is unnecessary further to comment thereon. We will only say that this case appears to us to be absolutely conclusive of the case at bar; for, if the *lands* and *property* of these Indians are exempt from such taxation, and if "an annual tax upon the annual value or user of real estate" is the same in substance as a tax upon the real estate itself, then, of course, any tax upon the means by which the land is so used is a tax upon the land or income itself.

The act of the Territorial Legislature providing for such taxation is, therefore, in direct conflict with the laws of the United States and the act permitting the Indians to use their unoccupied lands for grazing purposes, as, if a tax is put upon such cattle, the Indians would either be obliged to reduce the amount charged for the privilege or lose their income derived from that purpose altogether.

### III.

**The tax in question is in violation of the provisions of the Constitution of the United States that "Congress shall have power to regulate commerce with foreign nations, and among the several States and with the Indian tribes."**

The act of the Legislative Assembly of Oklahoma is also in conflict with clause 3 of section 8, article 1, of the

Constitution of the United States, providing that "Congress shall have power to regulate commerce \* \* \* with the Indian tribes," in that it interferes with, or imposes a servitude upon, a lawful commercial intercourse with the Indians, over which Congress, under the terms of said provision of the Constitution, has *absolute* control, and in the exercise of which control it has enacted the statute authorizing the leasing of the unoccupied lands of the Indians to which reference has already been made.

It can not be denied that the lands in question in this case, whether they are held to be entirely and completely excluded from the jurisdiction of the Territory of Oklahoma for all purposes or not, are subject to the undisturbed use and occupation of the Osage and Kansas Indians, as we have above shown, and were set apart by the United States, and reserved from the territorial jurisdiction conferred by the organic act for their exclusive enjoyment and benefit. These lands being so owned by said Indians and paid for with their own money, they are, of course, entitled to the free and unrestricted use of them in their intercourse with outside parties within the scope of such laws and regulations as Congress has made with reference thereto, and one of the modes provided by Congress for securing a benefit and deriving an income from said lands is by means of the leasing thereof for grazing purposes, as aforesaid.

"Traffic" is "commerce" (*Gibbons v. Ogden*, 9 Wheat., 1; *United States v. Holliday*, 3 Wall., 407), and dealing

with the Indians with reference to the utilization of their lands is traffic or commerce, which Congress has the exclusive power to regulate, and in this instance has regulated, as above set forth. It is not necessary, in order to bring this case within the constitutional provision, that the traffic shall begin outside and end or continue inside the reservation, or *vice versa*. It may begin or end in or be wholly confined to that reservation, and yet is commerce over which Congress has such supreme control. (*United States v. Holliday, supra.*)

The grazing of cattle upon these lands being a special means provided by Congress for utilizing them for the benefit of the Indians, is perfectly clear that it is not within the power of a Territory or State to tax that instrumentality. A State can not tax the bonds of the United States for familiar reasons, and it is submitted that upon precisely the same principle these cattle can not be taxed. The cattle are inseparably connected with the use and benefit derived from said lands, and it is, of course, impossible, therefore, to subject them to taxation without impairing this use and benefit.

Therefore, Congress having regulated this traffic or commerce, under the sole and exclusive jurisdiction of said matter, conferred by said provision of the Constitution, no interference with this right, either directly or indirectly, by the Territorial or county authorities, is permissible, and the legislative enactment on the subject above referred to is unconstitutional and void.

## IV.

**The tax assessed and sought to be collected in the present case is invalid, because not pertaining in a special and peculiar manner to the district within which it is levied, and because not concerning the people of that district more particularly than it does others.**

So much has been said in the other briefs in this case of the subject embraced in the above proposition, and the principle of taxation therein stated is so familiar and has been so universally asserted by the Courts, that any extensive presentation of the authorities here would be utterly useless. We will, therefore, only endeavor to show the application of said principle to the present case, but, before doing so, will quote from Judge Cooley the concise and comprehensive statement of said principle contained in the second edition of his work on Taxation (Chap. 5, p. 140), as follows:

"In the preceding chapter we have endeavored to show that in order to give validity to any demand made by the State upon its people under the name of a tax, it is *essential* that the purpose to be accomplished thereby shall be *public* in its nature. But it is *equally essential*, as there intimated, that the purpose shall be one which in an especial and peculiar manner pertains to the district within which it is proposed that the contribution called for shall be collected, and which concerns the people of that district more particularly, than it does others. The Federal Constitution recognizes this principle in the provisions it makes to prevent the Federal Government from indirectly imposing its support upon one or more of the States to the relief of others." (See article 1, section 8, clause 1; section 9, clauses 4 and 5.)

The purposes for which the taxes were levied in the case at bar are enumerated at page 30 of the record as follows :

For Territorial purposes :

General revenue, 3 mills on the dollar.

University fund, 1 mill on the dollar.

Normal school fund,  $\frac{1}{2}$  mill on the dollar.

Bond interest fund,  $\frac{1}{2}$  mill on the dollar.

Board of education fund,  $\frac{1}{2}$  mill on the dollar.

For county purposes :

For salaries, 5 mills on the dollar.

For contingent expenses, 3 mills on the dollar.

For sinking fund,  $1\frac{1}{2}$  mills on the dollar.

For court expenses,  $2\frac{1}{2}$  mills on the dollar.

For county supplies, 3 mills on the dollar.

For road and bridge fund, 2 mills on the dollar.

For poor fund, 1 mill on the dollar.

For county school fund, 1 mill on the dollar.

In short, these are the usual purposes for which taxes are levied upon the property of persons resident in the existing counties of the various States and Territories, and it is difficult to see how these Indians, who, as we have shown, are directly interested in the property sought to be taxed, or the plaintiffs in this case, who are all non-residents of both the Territory of Oklahoma and the county of Kay, and have no property therein, can derive any benefit from the expenditure of the money accruing therefrom.

As has been already stated, the trial court in this case

held that the county levy of  $2\frac{1}{2}$  mills for court expenses and all the levies for territorial purposes were valid, but that the other county taxes were invalid. Upon appeal by both parties to the Supreme Court of the Territory, the judgment below was affirmed *by a divided court*, one of the justices holding that all the taxes were valid, another, that they were all invalid, the other two concurring with the court below. Thus it will be seen that in the opinion of but one of the justices below were all these taxes valid; that two of the justices concurred with the trial court in holding that the county taxes were invalid because "the people upon these reservations are not interested in such levies, and receive no benefit from the expenditure of the moneys derived therefrom," and that the chief justice was of opinion that they were all invalid. (*R.*, p. 44.)

It seems to us that there can be no doubt whatever about the soundness of this opinion concurred in by four of the five justices of the court below (one of them, who did not sit at the hearing of the appeal, being the justice who decided the case in the first instance), that the county taxes for salaries, contingent expenses, sinking fund, county supplies, roads and bridges, poor fund, and school purposes are invalid. The reservations in question in this case being attached to the county *only* for *judicial* purposes, it is, of course, impossible that either the Indians, who are under the exclusive jurisdiction of the United States, or the owners of the cattle, who are residents of other States, could derive any benefit from such taxes, or that the district in which the



taxed property is located should be more particularly concerned in and benefited by the expenditure of the proceeds of such taxes than any other district.

The only question, therefore, is as to whether the tax for territorial and county court purposes is valid, for it is contended that although these reservations are not a part of the county of Kay, or within its limits, and are only attached thereto for judicial purposes, still as they are within the limits of Oklahoma, as defined by the act creating said Territory, the property of persons other than Indians located therein, must be made to bear the same burdens with respect to territorial and county court expenses as that of persons situate within the regularly organized counties of the Territory.

Of course, if our contentions with regard to the other matters referred to in this brief are to prevail, this whole question of taxation is thereby disposed of, and the territorial as well as the county authorities must be held to have exceeded their power in taxing the cattle of these complainants, but, assuming that the Court should not agree with us in the views above expressed, we still think that it is obvious that neither the occupants and possessors of the equitable title to said lands (the Indians) nor the parties owning the property taxed, can by any possibility derive any more benefit from the expenditure of the money derived from these territorial taxes than they could from such county taxation, they should likewise be declared void by this court.

Looking at it from the point of view of the owners of the cattle, how can it be said that they could by any

possibility be interested in, or benefited by, the maintenance of a normal school, a university fund, a board of education, the payment of interest on the bonded indebtedness of the Territory, or the sufficiency of the general revenue? It is not with the Territory of Oklahoma with which they have to deal, but with the United States and the Indians directly, and with regard to the use of lands over which the Territory has absolutely no jurisdiction. Neither they nor their said property receive any protection under the laws of the Territory, or any of the benefits of citizenship therein, the land upon which said cattle are located being a separate and distinct reservation for the use of the Indians alone, and not subject to any other jurisdiction or supervision than that of the Government of the United States.

So, also, in the case of the Indians, who, as we have seen, are likewise vitally interested in this tax. They are not citizens of the Territory, they are not represented in the Legislature or county board, they have absolutely no voice in the expenditure of the tax, and they receive from the Territory no protection.

In other words, this is an attempt to tax property in a jurisdiction over which the Government of the United States has exclusive control—to tax property located upon lands of which the Indians are guaranteed by the treaties and statutes, above set forth, the sole and exclusive use and benefit. This tax confers, and could confer, no benefit whatever upon these Indians or their lessees, either directly or indirectly, and is of benefit alone to the people outside of said reservation in the county of

Kay so far as the taxes are for county purposes, and in the Territory of Oklahoma, so far as they are for territorial purposes. It is, therefore, clearly taxation without representation, and without resulting benefit either to the parties taxed, the parties upon whose lands the taxed property is situate, or the district in which the tax is levied, and as such can not lawfully be levied and collected.

Upon all the grounds aforesaid I respectfully submit that the act in question in this case, providing for the taxation of these cattle, should be declared unconstitutional and void.

JEREMIAH M. WILSON,

*Attorney for Owners of Cattle upon the*

*Crow Indian Reservation in Montana.*

O. F. GODDARD,

*Of Counsel.*

No 284 & 439.

Petition for Rehearing.

Distributed May 3, 1898.

IN THE  
Supreme Court of the United States.

OCTOBER TERM, 1897.

A. M. THOMAS, ET AL,  
Appellants,

Against

D. P. GAY, ET AL,  
Appellees.

No. 287.

D. P. GAY, ET AL,  
Appellants,

Against

A. M. THOMAS, ET AL,  
Appellees.

No. 439.

PETITION FOR A REHEARING.

HENRY E. ASP,

JOHN W. SHARTEL,

Counsel for Gay & Reed, et al.

IN THE  
Supreme Court of the United States.

OCTOBER TERM, 1897.

A. M. THOMAS, ET AL,	}	No. 287.
Appellants,		
Against		
D. P. GAY, ET AL,	}	No. 439.
Appellees.		
D. P. GAY, ET AL,	}	
Appellants,		
Against		
A. M. THOMAS, ET AL,	}	
Appellees.		

PETITION FOR A REHEARING.

To the Supreme Court of the United States:

Your petitioners, the appellees in the case first above entitled and the appellants in the case second above entitled, respectfully pray for an order directing the rehearing of such cases, upon the following ground:

It is respectfully suggested that the court misapprehended the nature of the objection urged against

the taxes levied for purely county purposes in Kay county on property located in the Indian reservations, and has dealt with the question upon the supposition that the essence of the objection to these taxes is based upon a want of actual interest; whereas the real objection to these taxes rests in the fact that the attempted taxation for county purposes is an attempt to tax property located beyond the boundaries of the county, and that for this reason there is a want of that legal interest in the taxes which characterizes the attempt as the taking of private property for private purposes, and not due process of law; and it is furthermore respectfully suggested that, in the citation of authorities where it is claimed similar taxation has been upheld, the court has overlooked local conditions under which such decisions were rendered, which make the facts in the authorities cited entirely dissimilar from the facts in the case at bar, and render such authorities wholly inapplicable to the present case.

It was and is still urged that it is not competent for the legislature to authorize any municipality or municipal subdivision to tax property and persons beyond the territorial jurisdiction of such municipality or subdivision, and which the facts of the case at bar disclose an attempt to do.

Counsel submit a paper annexed hereto, enlarging the ground herein stated with the utmost brevity consistent with the importance of the subject matter,

and earnestly ask a reconsideration of the case upon the point herein suggested, and if this petition shall seem to the court to merit full consideration, that said cause may be reheard and reargued and the former decision revised and modified as the further consideration by the court of the case may require.

Wm. E. Gay & Co.  
John W. Shattell

Counsel for Gay & Reed, et al.

We hereby certify that, in our judgment, the above and foregoing petition for rehearing is well founded.

Wm. E. Gay & Co.  
John W. Shattell

Counsel for Gay & Reed, et al.



# GROUNDS UPON WHICH A REHEARING IS ASKED.

In the second assignment of error of the petitioners it is specified, "*because the said Osage and Kaw Indian reservations \* \* \* are no part of said Kay county for the purpose of taxation or for any municipal purposes/whatever*" (printed record, p. 57), and in their ~~brief~~, on page 47, responding to this assignment, it is claimed: "*and the said Indian reservations not being within the geographical boundaries of either of said counties, and the taxing of the holders of said property by the counties of the Territory is taking the property of persons holding property on said Indian reservations for the benefit of the residents of said counties, and is taking private property for private purposes.*" The Court, however, esteemed this objection to be of the following effect only, as expressed in the opinion: "*The most fundamental of these objections is found in the assertion that, so far as non-resident owners of cattle grazing within the Indian reservations are concerned, it is taxation without representation, and that such persons derive no benefit from the expenditure of the moneys accruing from the taxes.*"

The fact of the non-residence of the owners of this property was not introduced on the record as having any special bearing upon the question which we now urge, but was made the basis of the claim only that their property was taxed higher than the

property of the residents of the territory under the peculiar method of assessment adopted, and hence was taxing the property of non-residents higher than that of residents, in violation of the organic act of the Territory. The fact of the non-residence of the petitioners has no further bearing on this question than to show that neither their persons nor their property were within the geographical limits and territorial jurisdiction of the County of Kay, and for the purpose of this objection it is wholly immaterial whether they reside in some foreign state or within the boundaries of the Indian reservations, so long as neither their person nor property are within the boundaries of that county. No claim is made by the petitioners that it is taxation without representation or taxation without benefit, in the sense in which the application of that doctrine is denied in cases of aliens, non-residents or corporations, which have no palpable or direct interest in a tax, where the property is actually within the existing jurisdiction, conditions which are disclosed in *Meyer v. Grama*, 8 How., 492; *Witherspoon v. Duncan*, 4 Wall., 210; *Kelley v. Pittsburg*, 104 U. S., 78; *Anesbury Nail Co. v. Weed*, 17 Mass., 52, and other authorities cited in the opinion. These cases all present a legal interest in the purpose for which the tax is expended, though there may be an accidental want of tangible or apparent interest, as where a non-resident or an alien is taxed or as where a corporation is taxed for the support of

schools, their property being located within the territorial limits of the municipality in which the tax is expended. We intended to raise no such objection to this tax as is met by these decisions. What we do and did intend to assert is that when the boundaries of a municipality are passed, all legal interest in its institutions disappears. The distinction between taxation of persons and property in a municipality, who have an accidental want of apparent interest in the subject of the tax, and the attempt in the present case, is sought to be pointed out on page 80 of the brief of counsel, where it is said, "the taxation here is not analogous to the taxation of the property of a married woman," etc.

The allegations of the bill in this case with reference to the county taxes are substantially identical with those in *Farris v. Vannier*, 6 Dak., 186 (41 N. W. Rep., 31). In that case an unorganized county was attached to an organized county by the legislature for "judicial purposes." Subsequently, without the imposition of any other bond of union between the unorganized and organized counties, an attempt was made by the legislative authority to tax property located in the unorganized county for the support of the government in the organized county. It was held in this case that the attachment for judicial purposes did not have the effect to unite the two sections of country territorially for any local municipal purpose, and that the case presented a case of extra ter-

ritorial taxation, and the law was declared void as taking private property for private purposes.

We deem it to be well settled that the legislature cannot constitutionally authorize any municipality or subdivision to tax property located beyond its boundaries, because such taxation is taking property for private purposes, and is not due process of law.

"But such a burden would be inadmissible also, for the further reason that as to any property or person outside the district in which the tax was levied, the want of legal interest in the tax would preclude its being subjected to the burden." (Cooley on Taxation, 159.)

"There can be no question that an assessment of taxes, to be valid, must be within the jurisdictional limits of the taxing power and by the proper officer of the district or county where the taxes are levied." (People v. Wilkerson, 1 Idaho, 619.)

"But no instance, it is believed, can be found where these corporations have been clothed with power to tax others not within their local jurisdiction for their own local purposes."

Wells v. Weston, 22 Mo., 384.

Among other leading authorities denying the power of the legislature to authorize any municipality or subdivision to tax beyond its boundaries are:

City of St. Charles v. Nolle, 51 Mo., 122.

In re Town of Flatbush, 60 N. Y., 398.

Morford v. Unger, 8 Iowa, 82.

Sleight v. People, 74 Ill., 47.

Ryerson v. Utley, 16 Mich., 276.

Cheaney v. Hooser, 9 B. Mon., 341.

Bradshaw v. Omaha, 1 Neb., 16.

Territory v. Daniels (Utah), 22 Pac. Rep., 159.

We, therefore, think the validity of this tax depends on whether the attached territory is actually or virtually a part of the County of Kay; if it is, it is taxable for the support of its government; otherwise, not.

This principle is not at all inconsistent with the authorities cited in the opinion in this case, to wit:

Ry. Co. v. Fisher, 116 U. S., 28.

Ry. Co. v. Arizona, 156 U. S., 347.

Rld. Co. v. Peniston, 18 Wall., 5.

Cattle Co. v. Faught, 5 S. W. R., 494.

Philpin v. McCarty, 24 Kans., 393.

Kempner v. McClelland, 19 Ohio 308.

Hilliard v. Griffin, 33 N. W. R., 156.

Comins Twp. v. Harrisonville Twp., 45 Mich., 442; 8 N. W. Rep., 44.

Ry. Co. v. Fisher and Ry. Co. v. Arizona are entirely beside the question, for there the controversy concerned only the right to tax property in Indian reservations lying within the exterior boundaries of a county, and presented no question of extra territorial taxation.

We do not think that the case of Rld. Co. v. Peniston ought to be invoked as an authority on this

question, because that controversy only involved, first, whether the Union Pacific Railroad is a federal agency not subject to state taxation; and, second, whether that part of the road lying within the unorganized counties was taxed in the proper county, as a matter of construction of state law, and not as a question of power to enact such laws. The only claim made in the assignment of error in that case was as to whether this taxation is "valid and lawful under the legislation of the state." From the brief of counsel, on page 13 of the report of this decision, it further appears that the only question urged in this respect was a matter of construction of local law, and it therefore appears quite plain that the question presented here was in the mind of neither court nor counsel. Had it been, and had that decision resulted in a specific affirmance of the power of the legislature to tax property in that instance, it would still not be an authority in point here on account of a dissimilarity in local conditions. There the legislature had unquestioned power to make these unorganized counties a part of the organized counties. The attachment in that instance was for judicial and revenue purposes, and in effect made the unorganized county a part of the organized, at least for those purposes, as it appears by the Revised Statutes of Nebraska of 1860, sec. 226, that "the counties so attached shall be deemed to be within the limits of the county to which they are or may be annexed and form a part thereof."

The case of *Hilliard v. Griffin*, *supra*, is a Nebraska case and throws additional light on the local conditions concerning the junction of organized and unorganized counties and the effect of such union in that state, and in this case no question was raised like that in the case at bar, but the only point involved was as to what officials should collect the taxes remaining due in the unorganized county after it became an organized county. Neither was any question of extra territorial taxation raised in the case of *Cattle Co. v. Faught*, *supra*. There was a constitutional provision in the State of Texas that the property of non-resident owners should be taxed in the county where the same is located. The question there was whether property located in an unorganized county should be taxed in the county to which it was attached, or, should the tax be paid at the capitol of the state. It was held that the course of legislation in respect to the attachment of unorganized to organized counties made the unorganized counties substantially a part of the county to which it should be attached, and that therefore the taxes were collectible in such organized county. The question of the power of a municipality to tax property beyond its boundaries could not be involved in this case, nor is such power affirmed to exist, because the court premises in respect to the territorial union of the organized and unorganized county, "our legislature has almost uniformly treated an unorganized



county as part of the county to which it is attached for judicial purposes, so far as the exercise of local governmental powers over it is concerned." On the other hand, the opinion clearly assumes that the mere attachment for judicial purposes alone would not unite the two communities in any municipal sense.

*Philpin v. McCarty*, *supra*, presented no question of extra territorial taxation, as the only questions involved in that case were, (1) that the constitutional provisions of the state requiring an act of the legislature to contain only one subject, which shall be expressed in its title, is mandatory, and (2) that the act in question complies with the requirement. The law under consideration there created unorganized counties into a municipal township of the organized county to which it should be attached, and Brewer, J., in delivering the opinion of the court, expressly disclaims any intention to pass on any other question by saying: "No question is made of the power of the legislature to enact such a statute, but the point of challenge is in the title to act in which this section is found." From the act of the legislature involved in this decision, it appears that the unorganized county, by virtue of the act, is placed within the geographical limits of the organized county, and had the point been adjudged that this tax were valid against this objection, the conditions are so dissimilar that it would not be an authority in point in the present case.

*Kempner v. McClelland's Heirs*, 19 Ohio, 308, presented an actual union of two counties in fact for every purpose. The officers of the organized county were made ex-officio officers of the unorganized county, and the revenues collected in the unorganized county were expended therein for the benefit of its inhabitants. The decision presented nothing but a question of construction of local law, and involved no question of extra territorial taxation.

*Comins Twp. v. Harrisville Twp.*, *supra*, presented no question like that involved here, being purely a matter of construction of local law, and from the facts of the case, it is seen that the unorganized county there was attached to an organized county, both for "judicial and municipal purposes," and became a part of a township of the organized county, and upon being created a separate township of the organized county, brought action to recover that part of the revenues of the current year collected in its territory by the township of which it formerly composed a part, and its right to recover denied as a mere matter of construction of local statutes.

The effect of attaching unorganized country to an organized county for "judicial purposes," by an act of the legislature, is elaborately discussed by the Supreme Court of Montana in *Co. Commrs. v. Northern Pacific Rld. Co.*, 25 Pac. Rep., 158, where it was held that such annexation alone carried with it the

right to exercise no municipal control over the attached territory, either for revenue or any other purpose not strictly judicial in its character. The authority to tax under such conditions was denied.

So, also, in the case of *State v. Co. Commrs.*, 1 So. Dak., 292 (46 N. W. Rep., 1127), it was held that "a law attaching the unorganized counties of Nowlin and Stirling to Hughes county 'for judicial purposes' did not have the effect of so attaching for election purposes, such act being at once a grant and a limit of jurisdiction."

Now, the attachment of this unorganized country to the counties of the Territory was not even vested in the legislative, but in the judicial power, and is a direct denial of the authority of the legislature to deal with the same matter in the same respect, and if the law in the present case should be upheld, under a late order of the Supreme Court of the Territory transferring all these reservations to Pawnee county for judicial purposes, would present the spectacle of the people in these reservations paying taxes in one county and attending court in another, or, if the act of the legislature contemplated a change of the place of taxation, with the change of the attachment of the unorganized country to the organized counties for judicial purposes, would present a clear case of actual change of taxing districts by the judiciary of the Territory. These suggestions are made as merely illustrative of the consequences which will flow from the assump-

tion that the attachment of the unorganized country to the organized counties for judicial purposes embraces the idea of extension of the municipal jurisdiction of the county over such attached territory.

Other authorities bearing on the question as to what is imported by the attachment of territory to an organized municipality for judicial purposes are cited on page 26 of the petitioner's brief. No case can be found where taxation of attached territory has ever been based upon as slender a bond of union between the organized and unorganized sections of the country as a mere attachment for judicial purposes, and if it be assumed that all of the authorities cited in the opinion had specifically dealt with a claim of extra territorial taxation, such claim could have been easily met in each instance by showing that while the territory in question was nominally attached for judicial purposes by other legislation, it was made in fact a part of the organized county. Here the unorganized territory is attached solely for judicial purposes, without the imposition of any other bond of union, and with the legislative authority which attempted to impose this tax, powerless as is seen, to impose any additional bond of union or to make the unorganized country a part of any of the organized counties of the Territory of Oklahoma, either directly or indirectly. The conditions under which the authorities cited in the opinion were decided do not obtain in the present case, and cannot obtain in this case for the

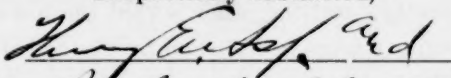
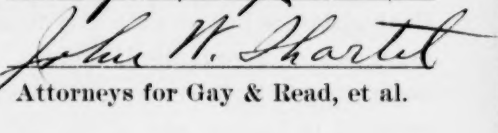
want of power in the legislature of the Territory to make these reservations substantially a part of any organized county.

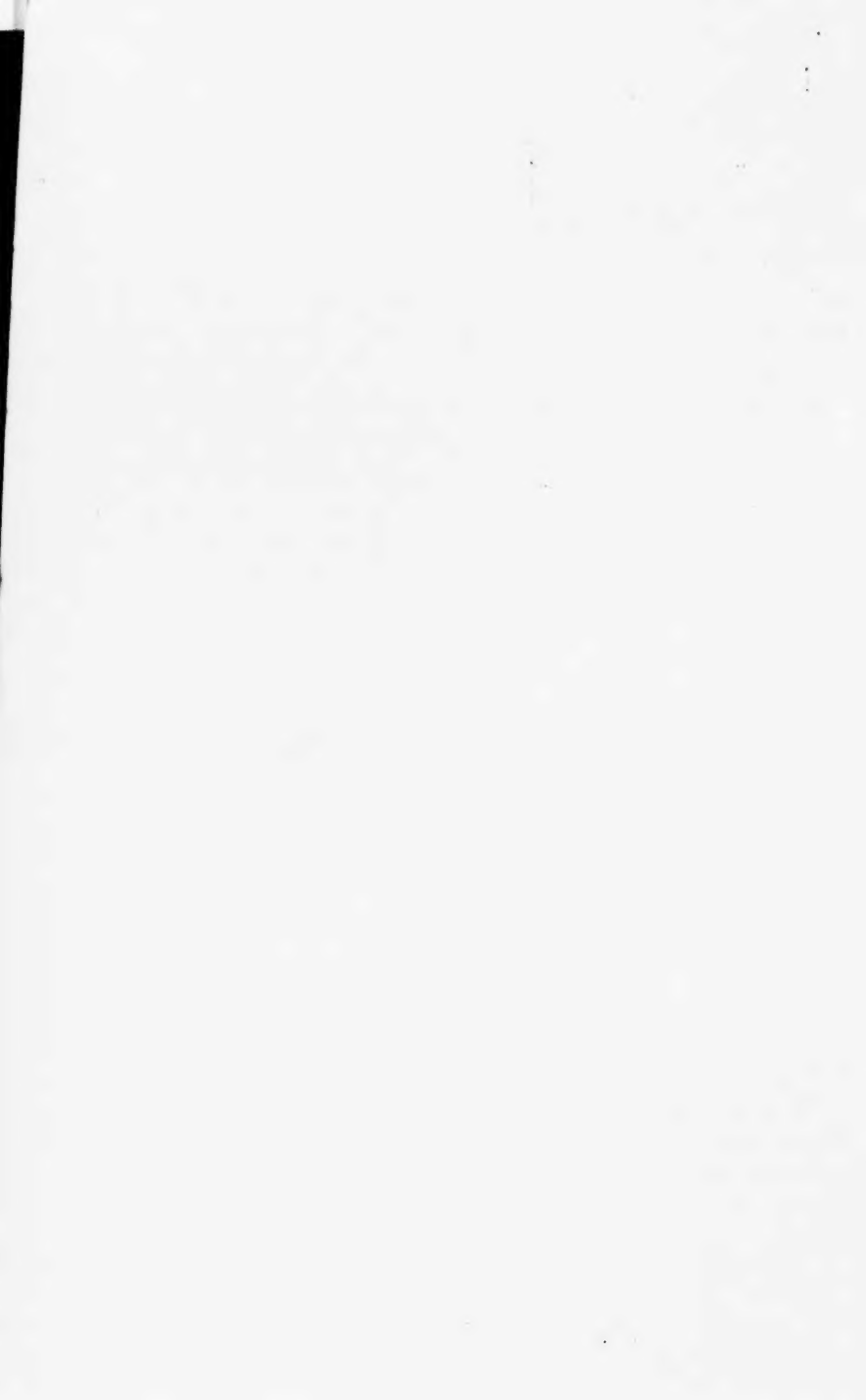
In the opinion in this case it is justly observed by the court: "The legislature was authorized to change the boundaries of the original counties, but were not given authority to include these Indian reservations or any lands not then opened to settlement in any of the counties." This expression is even stronger with reference to the counties of the Cherokee Outlet, of which Kay county is one of the counties, than it is with reference to the original counties of Oklahoma, for by the act opening the Cherokee Outlet to settlement, congress itself, with the aid of the Secretary of the Interior, established county boundaries, and the legislature was given no authority to change them. (27 Stat. L., p. 645.) So that the want of power in the legislature of the Territory in the present case is met by two inhibitions: One, the want of authority to incorporate unorganized country in any organized county—and what they could not do directly, of course they could not do indirectly—and the other is that the boundaries of Kay county were established by the act of congress, and the legislature has no authority to add any country, organized or unorganized, thereto. The legislative authority of the Territory, however, have never attempted to impose any of the local governmental functions of the counties upon these Indian reserva-

tions, nor attempted to make any of these reservations a part of any organized county.

We therefore earnestly ask the Court to reconsider the case upon this proposition, believing the Court did not intend to consciously hold it to be within the competent authority of the legislature to tax property for the benefit of a municipality which has its situs beyond the boundaries of such municipality, and believing that, if the opinion heretofore rendered in this case should remain unchallenged in this respect, it might be open to the possibility of such a construction and be the means of introducing a dangerous principle in the constitutional interpretation of the authority of the legislatures in distributing public burdens and imposing them upon classes who owe no duty to the institutions for whose support they are taxed, and have a tendency to create an impression that might lead to the attempt on the part of legislative authority to show no regard for the boundaries of its municipalities in the authority for taxation for the support of their institutions.

Respectfully submitted,

  
  
Attorneys for Gay & Read, et al.





## Statement of the Case.

THOMAS *v.* GAY.GAY *v.* THOMAS.APPEALS FROM THE SUPREME COURT OF THE TERRITORY OF  
OKLAHOMA.

Nos. 257, 489. Argued and submitted October 21, 22, 1897. — Decided February 21, 1898.

The act of the legislature of the Territory of Oklahoma of March 5, 1895, c. 43, which provided that "when any cattle are kept or grazed or any other personal property is situated in any unorganized country, district or reservation of this Territory, such property shall be subject to taxation in the organized county to which said country, district or reservation is attached for judicial purposes," was a legitimate exercise of the Territory's power of taxation, and, when enforced in the taxation of cattle belonging to persons not resident in the Territory grazing upon Indian reservations therein, does not violate the Constitution of the United States.

The Supreme Court of the Territory in this case sustained the authority of the board of equalization to increase the assessment or valuation, and in a subsequent case decided the other way. In view of the fact that the judgment in this case is reversed, and the case remanded for further proceedings, this court declines to pass upon the question.

THESE are cross-appeals from the Supreme Court of the Territory of Oklahoma. The facts, as stated in the opinion of the court below, were as follows:

The appellants are non-residents of the Territory of Oklahoma and owners of large herds of cattle that were kept and grazed, during a portion of the year 1895, in parts of the Osage Indian reservation in this Territory.

The appellees are the board of county commissioners, treasurer and sheriff of Kay County, Oklahoma Territory.

On the third Monday in February, 1894, the Supreme Court of the Territory of Oklahoma, by an order entered on the journals of said court, attached to said county of Kay, for judicial purposes, all the Kaw or Kansas Indian reservation and all of the Osage Indian reservation north of the township line dividing townships 25 and 26 north. All of said reservations so attached to said Kay County for judicial purposes by such

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order are without the boundaries of said Kay County as established by the governor and are not within the boundaries of any organized county of this Territory. Said territory so attached to said county of Kay for judicial purposes is comprised wholly of lands owned and occupied by Indian tribes, and consists principally of wild, unimproved and unallotted lands used for grazing purposes; that plaintiffs in error during the year 1895 and during the month of April of said year drove, transported and shipped to the ranges and pastures in that part of said Osage Indian reservation attached to said Kay County for judicial purposes, as aforesaid, large herds and numbers of cattle, which were taken to said reservation in pursuance and by virtue and authority of certain leases to plaintiffs in error for grazing purposes made by the Osage tribal government under the supervision of the agent in charge of said tribe and upon the ratification and approval of the Commissioner of Indian Affairs and of the Secretary of the Interior, and said cattle of said plaintiffs in error were on the first day of May kept and grazed on that part of said Indian reservation attached to said Kay County for judicial purposes, as aforesaid.

By an act approved March 5, 1895, c. 43, the legislative assembly of the Territory of Oklahoma amended section 13, article 2, chapter 70, of the Oklahoma Statutes relating to revenue, so that the same reads as follows: "That when any cattle are kept or grazed or any other personal property is situated in any unorganized country, district or reservation of this Territory, such property shall be subject to taxation in the organized county to which said country, district or reservation is attached for judicial purposes," and authorized the board of county commissioners of the organized county or counties to which such unorganized country, district or reservation is attached to appoint a special assessor each year, whose duty it should be to assess such property, and conferred upon such special assessor all the powers and required him to perform all the duties of a township assessor. The assessor so provided for was required to begin and perform his duties between the first day of April and the 25th day of May of each year and

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to complete his duties and return his tax lists on or before June 1, and the property therein authorized to be assessed, it was provided, should be valued as of May 1, each year.

In pursuance of the provisions of said act the county commissioners of said Kay County did duly appoint a special assessor for the year 1895 to assess such cattle as were kept and grazed and any other personal property situated in the unorganized country and parts of Indian reservations attached to said Kay County for judicial purposes, and said special assessor did, by virtue of said appointment, assess all the personal property in the territory so attached to the county of Kay for judicial purposes, including all of the cattle of the said appellants kept and grazed in said reservation on the first day of May, 1895. The said special assessor assessed the property of these appellants so located on said territory attached to said county of Kay for judicial purposes, as aforesaid, and returned the same upon an assessment roll at the total valuation of \$760,469; that thereafter the said sum was, by the clerk of said county, carried into the aggregate assessment for said county, and by him certified to the auditor of the Territory; that the Territorial board of equalization in acting upon the various assessments of the various counties as certified to said board raised the aggregate valuation of the property returned for taxation upon the tax rolls of said county of Kay thirty-five per cent, and the county clerk for said county carried out the raised valuation so certified to him by said Territorial board of equalization against the property of these appellants and made the aggregate valuation of such property \$1,026,634. Thereafter the Territorial board of equalization levied and duly certified to the county clerk of the county of Kay tax levies for Territorial purposes for the year 1895 as follows: General revenue, three mills on the dollar; university fund, one half mill on the dollar; normal school fund, one half mill on the dollar; bond interest fund, one half mill on the dollar; board of education fund, one half mill on the dollar.

The board of county commissioners for the county of Kay made the following levies for the year 1895: for salaries, five

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mills on the dollar; for contingent expenses, three mills on the dollar; for sinking fund, one and one half mills on the dollar; for court expenses, two and one half mills on the dollar; for county supplies, three mills on the dollar; for road and bridge fund, two mills on the dollar; for poor fund of said county, one mill on the dollar; for county school fund of said county, one mill on the dollar.

The county clerk of said county of Kay carried the valuation of the property of these plaintiffs in error upon the tax rolls of said county, and against the same extended the levies as aforesaid, and charged against the property of these plaintiffs in error in the aggregate the sum of \$26,174.16.

Before these taxes became delinquent, plaintiffs in error began to remove or attempted to remove their respective property from the territory attached to Kay County for judicial purposes and beyond the limits of Oklahoma Territory. The treasurer of said Kay County issued tax warrants for the several amounts of taxes levied against the property of each of said plaintiffs in error, and delivered the same to the sheriff of said county for execution; said sheriff seized certain property of each of appellants by virtue of such tax warrants. The appellants filed their several petitions in the District Court of Kay County, and, on application, obtained injunctions restraining the appellees from making any further attempt to collect such taxes. Afterwards, on motion, the several actions were consolidated into one. To the petition filed in such consolidated action the defendants in error filed a general demurrer. At the hearing, the District Court sustained the demurrer in part and overruled it in part, holding that all of the levies made for Territorial purposes and the county levy for court expenses were valid, and as to those levies the injunction was dissolved, and as to all of the other county levies such injunctions were made perpetual. From that part of the order and judgment of the court, dissolving the injunction as to the Territorial taxes and the one county fund levy, plaintiffs appealed. From that part perpetuating the injunction as to all of the county levies, except that for court expenses, the defendants appealed and filed their cross-petitions

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in error, and the case was taken to the Supreme Court of the Territory. In that court the judgment of the District Court was affirmed. Three of the four judges, who sat in the case, agreed in holding that the taxes levied for territorial and court expense funds were valid; two were of opinion that the balance of the taxes were unauthorized; one was of opinion that all the taxes were validly levied, and the fourth judge dissented *in toto*. From that judgment of the Supreme Court of the Territory both parties appealed to this court.

*Mr. Henry E. Asp* and *Mr. John W. Shartel* for Gay.

*Mr. J. F. King* for Thomas and others, county commissioners, submitted on their brief.

*Mr. Jeremiah M. Wilson* and *Mr. O. F. Goddard* filed a brief on behalf of other owners of cattle grazing on the reservations.

*Mr. H. S. Cunningham* filed a brief on behalf of the Territory.

MR. JUSTICE SHIRAS, after stating the case, delivered the opinion of the court.

It is claimed that the legislative assembly of the Territory of Oklahoma was without power to enact the law of March 5, 1895, providing for the taxing of cattle grazing upon the Indian reservations under leases granted by the Indians, because, both before and since the creation of said Territory, exclusive jurisdiction over said Indians and their lands, and over all matters in any way affecting them, or in which they are interested, is in the United States.

It is, indeed, true that the lands in question, constituting the reservations of the Osage and Kansas Indians, are portions of lands previously granted by patent of the United States, in pursuance of the treaty of May 6, 1828, 7 Stat. 311, and of the treaty of December 29, 1835, 7 Stat. 478, to the Cherokee

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Nation of Indians, and that it was provided, in those treaties, that the lands so granted should not, without the consent of the Indians, at any future time be "included within the territorial limits or jurisdiction of any State or Territory."

In the subsequent treaty with the Cherokees of July 19, 1866, 14 Stat. 799, 804, it was stipulated that the United States might "settle friendly Indians in any part of the Cherokee country west of the 96th degree, to be taken in a compact form, in quantity not exceeding 160 acres for each member of each of said tribes thus to be settled, the boundaries of each of said districts to be distinctly marked, and the land conveyed in fee simple to each of said tribes, . . . said land to be paid for to the Cherokee Nation, at such price as may be agreed upon between the said parties in interest, subject to the approval of the President."

On the 26th of June, 1866, a treaty was made with the Osage Indians, 14 Stat. 687, wherein it was provided that a large part of the reservation then occupied by that tribe in Kansas was sold outright to the Government for a certain sum of money, and by article 16 of said treaty it was provided that "If said Indians should agree to remove from the State of Kansas and settle on land to be provided for them by the United States in the Indian Territory, on such terms as may be agreed upon between the United States and the Indian tribes now residing in said Territory, or any of them, then the diminished reservation shall be disposed of by the United States in the same manner and for the same purposes as hereinbefore provided in relation to said trust lands, except that fifty per cent of the proceeds of the sale of said diminished reserve may be used by the United States in the purchase of lands for a suitable home for said Indians in said Indian Territory."

On July 15, 1870, 16 Stat. 335, Congress passed an act, providing, in substance, that whenever the Osages should agree thereto, in such manner as the President should prescribe, said Indians should be removed from their said diminished reservation in the State of Kansas to the lands to be provided for them in the Indian Territory, "to consist of a tract of land

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in compact form, equal in quantity to 160 acres for each member of tribe, to be paid for out of the proceeds of the sales of their lands in the State of Kansas;" and subsequently the Osages were established upon their present reservation, and the Cherokees were paid therefor the sum of \$1,650,600; and by an act approved June 5, 1872, 17 Stat. 228, Congress confirmed this reservation in said Cherokee country.

The history of the transfer of the so-called Kaw or Kansas Indians from their reservation in the State of Kansas to lands bought from the Cherokee Nation, constituting their present reservation, was similar to that of the Osages, and calls for no special narration.

In 1883, sufficient money having been realized from the sales to pay for said lands, a deed was duly executed by the Cherokees conveying all their rights and title in and to the United States for the use of the said Osage and Kansas Indians, which deed is recorded in volume 6 of the Indian Deeds in the office of the Commissioner of Indian Affairs in the Department of the Interior.

It is alleged that, by no subsequent treaty, have either the Cherokee or the Osage or Kansas Indians consented that the lands here in question should be included within the limits or jurisdiction of the Territory of Oklahoma; and it is accordingly now contended that under the provision contained in the Cherokee treaties, the lands therein designated should never be embraced within the limits of a Territory or State without the consent of said Indians, the exemption or right thereby created runs with the land, subject to which said lands, or any part thereof, could be conveyed to other Indians, and is not a right belonging solely to the Cherokees, which ceased to exist when the ownership of the Cherokees therein terminated.

Whether, without express stipulation to that effect, the right granted by treaty to the Cherokee Nation, to be exempt, as to their lands, from inclusion within the limits of any Territory or State, passed with the grant of a portion of such lands to the Osage and Kansas Indians, we need not consider, because, even if such were the law, it is conceded that the United States have, by the act of May 2, 1890, 26 Stat. 81,



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creating the Territory of Oklahoma, included these Osage and Kansas Indian lands within the geographical limits of said Territory.

It is well settled that an act of Congress may supersede a prior treaty, and that any questions that may arise are beyond the sphere of judicial cognizance, and must be met by the political department of the Government.

"It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument. This results from the nature and fundamental principles of our Government. The effect of treaties and acts of Congress, when in conflict, is not settled by the Constitution. But the question is not involved in any doubt as to its proper solution. A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty. *Foster v. Neilson*, 2 Pet. 253, 314; *Taylor v. Morton*, 2 Curtis, 454.

"In the cases referred to, these principles were applied to treaties with foreign nations. Treaties with Indian nations within the jurisdiction of the United States, whatever considerations of humanity and good faith may be involved and require their faithful observance, cannot be more obligatory. . . . In the case under consideration the act of Congress must prevail as if the treaty were not an element to be considered." *The Cherokee Tobacco*, 11 Wall. 616.

That was a case where an act of Congress extended the revenue laws as respected tobacco over the Indian territories, regardless of provisions in prior treaties that exempted tobacco raised by Indians on their reservations.

The grant of legislative power to the Territory of Oklahoma, contained in the sixth section of the organic act, was as follows:

"The legislative power of the Territory shall extend to all rightful subjects of legislation, not inconsistent with the Constitution and laws of the United States, but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed on the property of the United States, nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents, nor shall

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any law be passed impairing the right to private property, nor shall any unequal discrimination be made in taxing different kinds of property, but all property subject to taxation shall be taxed in proportion to its value."

With the Indian reservations brought, by valid legislation, within the limits of the Territory, and with the broad grant of legislative power contained in the section just quoted, we are next to consider objections urged to the validity of the act of the territorial assembly, approved March 5, 1895, wherein it provides that "when any cattle are kept or grazed, or any other personal property is situated in any unorganized country, district or reservation of this Territory, such property shall be subject to taxation in the organized county to which said country, district or reservation is attached for judicial purposes."

Our attention is called to the following provision contained in the first section of the organic act:

"Nothing in this act shall be construed to impair any right now pertaining to any Indians or Indian tribe in said Territory under the laws, agreements and treaties of the United States, or to impair the rights of persons or property pertaining to said Indians, or to affect the authority of the United States to make any regulation or to make any law respecting said Indians, their lands, property or other rights, which it would have been competent to make or enact if this act had not been passed."

And also to section 3 of the act of February 28, 1891, c. 383, 26 Stat. 794, as follows:

"Where lands are occupied by Indians, who have bought and paid for the same, and which lands are not needed for farming or agricultural purposes, and are not desired for individual allotments, the same may be leased by authority of the council, speaking for such Indians, for a period not to exceed five years for grazing or ten years for mining purposes, in such quantities and upon such terms and conditions as the agent in charge of such reservation may recommend, subject to the approval of the Secretary of the Interior."

And the contention is that, irrespective of the question whether said lands are, by the treaties, excluded from the

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limits and jurisdiction of the Territory of Oklahoma, the taxation of cattle located for grazing purposes upon the reservations, under leases duly authorized by act of Congress, is a violation of the rights of the Indians and an invasion of the jurisdiction and control of the United States over them and their lands.

As to that portion of the argument which claims that, even if the Indians were not interested in any way in the property taxed, the territorial authorities would have no right to tax the property of others than Indians located upon these reservations, it is sufficient to cite the cases of *Utah & Northern Railway v. Fisher*, 116 U. S. 28, and *Maricopa & Phoenix Railroad v. Arizona*, 156 U. S. 347, in which it was held that the property of railway companies traversing Indian reservations are subject to taxation by the States and Territories in which such reservations are located.

But it is urged that the Indians are directly and vitally interested in the property sought to be taxed, and that their rights of property and person are seriously affected by the legislation complained of; that the money contracted to be paid for the privilege of grazing is paid to the Indians as a tribe, and is used and expended by them for their own purposes, and that if, by reason of this taxation, the conditions existing at the time the leases were executed were changed, or could be changed by the legislature of Oklahoma at its pleasure, the value of the lands for such purposes would fluctuate or be destroyed altogether according to such conditions.

But it is obvious that a tax put upon the cattle of the lessees is too remote and indirect to be deemed a tax upon the lands or privileges of the Indians. A similar contention was urged in the case of *Erie Railroad v. Pennsylvania*, 158 U. S. 431. There the State of Pennsylvania had imposed a tax upon a railroad, situated within the borders of that State, but leased to another railroad company engaged in carrying on interstate commerce, and this tax was measured by a reference to the amount of the tolls received by the lessor company from the lessee company. It was claimed that the imposition of a tax on tolls might lead to increasing them in an effort to throw

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their burthen on the carrying company, and thus, in effect, become a tax or charge upon interstate commerce. But this court held that such a tax upon tolls was too indirect and remote to be regarded as a tax or burthen on interstate commerce. A similar view was taken in the case of *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, where a tax imposed by the State of Kentucky on the intangible property of a company which owned and maintained a bridge over a river between two States was contended to be objectionable as constituting a burthen upon interstate commerce, but it was held that the fact that the tax in question was to some extent affected by the amount of the tolls received, and therefore might be supposed to increase the rate of tolls and thus be a burthen on interstate commerce, was too remote and incidental to make it a tax on the business transacted. *Adams Express Co. v. Ohio State Auditor*, 166 U. S. 185.

The suggestion that such a tax on the cattle constitutes a tax on the lands within the reasoning in the case of *Pollock v. Farmers' Loan and Trust Co.*, 157 U. S. 429, is purely fanciful. The holding there was that a tax on rents derived from lands was substantially a tax on the lands. To make the present case a similar one the tax should have been levied on the rents received by the Indians, and not on the cattle belonging to third parties.

It is further contended that this tax law of the Territory of Oklahoma, in so far as it affects the Indian reservations, is in conflict with the constitutional power of Congress to regulate commerce with the Indian tribes. It is said to interfere with, or impose a servitude upon, a lawful commercial intercourse with the Indians, over which Congress has absolute control, and in the exercise of which control it has enacted the statute authorizing the leasing by the Indians of their unoccupied lands for grazing purposes.

The unlimited power of Congress to deal with the Indians, their property and commercial transactions, so long as they keep up their tribal organizations, may be conceded; but it is not perceived that local taxation, by a State or Territory, of property of others than Indians would be an interference with

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Congressional power. It was decided in *Utah & Northern Railway v. Fisher*, 116 U. S. 28, that the lands and railroad of a railway company within the limits of the Fort Hill Indian reservation in the Territory of Idaho was lawfully subject to territorial taxation, which might be enforced within the exterior boundaries of the reservation by proper process. The question was similarly decided in *Maricopa & Phoenix Railroad v. Arizona Territory*, 156 U. S. 347.

The taxes in question here were not imposed on the business of grazing, or on the rents received by the Indians, but on the cattle as property of the lessees, and, as we have heretofore said that as such a tax is too remote and indirect to be deemed a tax or burthen on interstate commerce, so is it too remote and indirect to be regarded as an interference with the legislative power of Congress.

These views sufficiently dispose of the objections urged against the power of the legislative assembly of Oklahoma to pass laws taxing property within the limits of the Indian reservations and belonging to persons not Indians. We must now consider the objections made to the mode in which that power was exercised in the act of March 5, 1895.

The most fundamental of these objections is found in the assertion that, so far as non-resident owners of cattle grazing within the Indian reservations are concerned, it is taxation without representation, and that such persons derive no benefit from the expenditure of the moneys accruing from the tax.

The organic act, as we have already seen, extends the exterior boundary of the Territory around these Indian reservations. It also provided for the division of the Territory into council and representative districts, and for the election of a legislative assembly and of a delegate to Congress. The Indian reservations were not included within any of the council or representative districts. The act provided that there should be seven counties, and fixed the county seats, and under the authority of the act the governor established the boundaries of these counties. The legislature was authorized to change the boundaries of the original counties, but was not given authority to include these Indian reservations, or any lands not then

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open to settlement in any of the counties. By section nine it was provided that the Territory should be divided into three judicial districts; that the Supreme Court should define such judicial districts; and that the territory not embraced in organized counties should be attached, for judicial purposes, to such organized county or counties as the Supreme Court should determine. In May, 1890, the Supreme Court made an order attaching the several Indian reservations to certain organized counties for judicial purposes, and by an order on February 3, 1894, attached the reservations in question in this case to Kay County for judicial purposes.

As already stated, by the act of March 5, 1895, it was provided that when any cattle are kept or grazed or any other personal property is situated in any unorganized country, district or reservation, such property shall be subject to taxation in the organized county to which said country, district or reservation is attached for judicial purposes; and provision was made for the appointment of a special assessor for such unorganized country, district or reservation. Under this condition of affairs it is contended that the taxing power cannot be lawfully exerted as respects property within these reservations. It is said that those to be affected by the tax have no voice in the election of the legislature to make the laws by which they are to be governed; that they have no school facilities for their children; that they cannot organize towns, so as to have the benefit of the police and sanitary laws of the Territory; that the officers of Kay County have no authority to expend any portion of the moneys raised by this taxation in improving roads within the Indian reservation; that they cannot participate in the election of the territorial delegate; and that they are not benefited by the taxes appropriated for salary fund, contingent expense fund, sinking fund, road and bridge fund, poor fund, etc.

Undoubtedly there are general principles, familiar to our systems of state and Federal government, that the people who pay taxes imposed by laws are entitled to have a voice in the election of those who pass the laws, and that taxes must be assessed and collected for public purposes, and that the duty

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or obligation to pay taxes by the individual is founded in his participation in the benefits arising from their expenditure. But these principles, as practically administered, do not mean that no person, man, woman or child, resident or non-resident, shall be taxed, unless he was represented by some one for whom he had actually voted, nor do they mean that no man's property can be taxed unless some benefit to him personally can be pointed out. Thus it has been held that personal allegiance has no necessary connection with the right of taxation; an alien may be taxed as well as a citizen. *Mager v. Grima*, 8 How. 490; *Witherspoon v. Duncan*, 4 Wall. 210. So, likewise, it is settled law that the property, both real and personal, of non-residents may be lawfully subjected to the tax laws of the State in which they are situated.

The specific objection made to the validity of these taxes as imposed on personal property located in unorganized countries or in the reservations does not seem to us to be well founded. We have already cited the cases of *Utah & Northern Railway Company v. Fisher*, 116 U. S. 28, and *Maricopa & Phoenix Railroad v. Arizona*, 156 U. S. 347, wherein territorial tax laws were held to have a valid operation over property lying within Indian reservations. *Union Pac. Railroad v. Peniston*, 18 Wall. 5, 37, was a case where unorganized country was attached by law to an organized county for judicial and revenue purposes, and the law was sustained, as appears in the decision delivered by Mr. Justice Strong, as follows:

"It remains only to notice one other position taken by the complainants. It is that if the act of the State under which the tax was laid be constitutional in its application to their property within Lincoln County, the property outside of Lincoln County is not lawfully taxable by the authorities of that county under the laws of the State. To this we are unable to give our assent. By the statutes of Nebraska the unorganized territory west of Lincoln County, and the unorganized country of Cheyenne, are attached to the county of Lincoln for judicial and revenue purposes. The authorities of that county, therefore, were the proper authorities to levy the tax upon the property thus placed under their charge for revenue purposes."



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In *Llano Cattle Co. v. Faught*, 5 S. W. Rep. 494 (Texas), the case was that an unorganized country was attached by law to the organized county of Scurry for judicial purposes. The officers of Scurry County assessed and levied county taxes upon the cattle of the plaintiff, a foreign corporation, kept in the unorganized country, and it was held that the unorganized country, being in effect a part of the county to which it was so attached, the collection of taxes on such personalty of a non-resident may be enforced by the tax collector of the latter county. We are referred to similar decisions in Kansas: *Phillip v. McCarty*, 24 Kansas, 393; in Ohio: *Kemper v. McClelland*, 19 Ohio, 308; in Iowa: *Hilliard v. Griffin*, 33 N. W. Rep. 156; in Michigan: *Comins v. Township of Harrisville*, 45 Michigan, 442.

It is further contended that, while the taxes assessed for territorial and court expense funds may be valid, yet that the balance of the taxes, levied for county purposes and expended within the geographical limits of Kay County, are unauthorized, for the reason that the people on these reservations are not interested in such taxes, and receive no benefit from their expenditure. But, as it seems to us, it cannot be maintained that those plaintiffs whose cattle are within the protection of the laws of Oklahoma receive no benefit from the expenditures in Kay County. Certainly they have some advantage in the improvement of the roads within that county, when they journey to and from the towns and settlements in the organized county. They are interested in the prevalence of law and order in the communities adjacent to their property, and in the provision made for the care of the poor and insane. It is to be presumed that they have a right to send their children to the schools in the organized county.

The cases, both state and Federal, are numerous in which it has been held that taxes, otherwise lawful, are not invalidated by the allegation, or even the fact, that the resulting benefits are unequally shared.

In *Kelly v. Pittsburg*, 104 U. S. 78, the complaint was that certain water, street, gas, school and other taxes were unlawfully assessed against the property of the plaintiff, which,

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though lying within city limits, were not benefited by such taxes; but this court, affirming the Supreme Court of Pennsylvania, said:

"We are unable to see that the taxes levied on this property were not for a public use. Taxes for schools, for the support of the poor, for protection against fire, and for waterworks are the specific taxes found in the list complained of. We think it will not be denied by any one that these are public purposes in which the whole community have an interest, and for which, by common consent, property owners everywhere in this country are taxed. There are items styled city tax and city buildings which, in the absence of any explanation, we must suppose to be for the good government of the city, and for the construction of such buildings as are necessary for municipal purposes. . . . It may be true that the plaintiff does not receive the same amount of benefit from some or any of these taxes as do citizens living in the heart of the city. It is probably true, from the evidence found in this record, that his tax bears a very unjust relation to the benefits received as compared with its amount. But who can adjust with precise accuracy the amount which each individual in an organized civil community shall contribute to sustain it, or can insure in this respect absolute equality of burthens and fairness in their distribution among those who must bear them?

"We cannot say judicially that the plaintiff received no benefit from the city organization. These streets, if they do not penetrate his farm, lead to it. The waterworks will probably reach him some day, and may be near enough to him now to serve him on some occasion. The schools may receive his children, and in this regard he can be in no worse condition than those living in the city who have no children, and yet who pay for the support of the schools. Every man in a county, a town, a city or a State is deeply interested in the education of the children of the community, because his peace and quiet, his happiness and prosperity, are largely dependent upon the intelligence and moral training which it is the object of public schools to supply to the children of his neighbors and associates, if he has none himself."

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It is no objection to a tax that the party required to pay it derives no benefit from the particular burthen; *e.g.* a tax for school purposes levied upon a manufacturing corporation. But, in truth, benefits always flow from the appropriation of public moneys to such purposes, which corporations in common with national persons receive in the additional security to their property and profits. *Amesbury Nail Factory Co. v. Weed*, 17 Mass. 53.

In *Cooley on Taxation*, 16, the result of a wide examination of the cases is thus stated:

"If it were practicable to do so, the taxes levied by any government ought to be apportioned among the people according to the benefit which each receives from the protection the Government affords him; but this is manifestly impossible. The value of life and liberty, and of the social and family rights and privileges cannot be measured by any pecuniary standard; and by the general consent of civilized nations, income or the sources of income are almost universally made the basis upon which the ordinary taxes are estimated. This is upon the assumption, never wholly true in point of fact, but sufficiently near the truth for the practical operations of Government, that the benefit received from the Government is in proportion to the property held, or the revenue enjoyed under its protection; and though this can never be arrived at with accuracy, through the operation of any general rule, and would not be wholly just if it could be, experience has given us no better standard, and it is applied in a great variety of forms, and with more or less approximation to justice and equality. But, as before stated, other considerations are always admissible; what is aimed at is, not taxes strictly just, but such taxes as will best subserve the general welfare of the political society."

The fact that the taxes in question are levied on personal property only and thus exempt real property is urged as an objection to the validity of the act. It is claimed that such an exemption operates as an unjust discrimination.

As the owners of the cattle taxed own no real estate within the Indian reservation, this objection, if sound, would render

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it impossible to tax the cattle at all. But it is the usual course in tax laws to treat personal property as one class and real estate as another, and it has never been supposed that such classification created an illegal discrimination, because there might be some persons who owned only personal property, and others who owned property of both classes. Again, it is complained that this law violates the principle of uniformity, and operates as an unjust discrimination, because it provides for an assessment of cattle, kept and grazed on the Indian reservations, at a different time from that provided for the assessment of personal property, including cattle, in the organized country.

It is not unusual for tax laws to authorize the assessment of different classes of property at different dates, and even of the same classes of property in different localities at different dates. Such matters of regulation must be supposed to be within the power of the State or Territory, and to have their reasons in special facts known to the legislature. We are informed that the revenue laws of Oklahoma provide that real estate shall be valued for taxation on the first day of January, and personal property in the organized counties on the first day of February of each year, and the personal property upon the reservations on May 1. The gravamen of the complaint is that cattle are fatter and more valuable on May 1 than on February 1, and hence there is an inequality in the assessments. On the other hand, it is claimed that if the cattle on the reservations were to be valued for taxation in February, the larger part would escape taxation, as they are not driven to the reservations till April.

A similar objection was urged against the validity of a tax law of the State of Wisconsin, wherein April 1 was fixed as the date for assessing saw logs belonging to non-residents and May 1 for assessing saw logs of residents. The court said :

"It is claimed that this law violates the principle of uniformity in providing for an assessment of the logs of a non-resident at a different time than that provided in the case of residents; that for the same reason it discriminates unjustly against non-residents. But I am of opinion that the case

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does not come within either of these principles. . . . The legislature was aware that the logs of non-residents as well as resident owners were liable to be floated out of the State in the month of April." *Nelson Lumber Co. v. Loraine* (Ct. Ct. of U. S. for Dist. of Wisconsin), 22 Fed. Rep. 54.

In Missouri a statute was held valid which provided that real property should be assessed every two years in all counties outside of St. Louis, and that all property in the city of St. Louis should be assessed every year, for state and municipal taxes, and this although in the particular case it was shown that this difference in the time of the assessments made a considerable difference in the amount of the taxes. *State v. New Lindell Hotel Co.*, 9 Mo. App. 450.

A law providing different times for assessments for state taxes in the State of New York was held to be legal. *People v. Commissioners of Taxes*, 91 N. Y. 593.

Several other provisions of the act in question are pointed to as creating discriminations against taxpayers whose property is in the unorganized district and reservations, such as these; that city and township assessors are required to be residents and qualified voters in the township or city where elected, but there is no such requirement imposed on the special assessor appointed by the board of county commissioners to assess the personal property in the reservations and unorganized districts; that the several township and city assessors are required to meet at the county seat and agree upon an equal cash basis of valuation of all property that they may be called upon to assess, but in this matter the special assessors do not participate; that the township assessor, clerk and treasurer are a township board of equalization, and the mayor, city clerk and city assessor are a city board of equalization, but that, in the case of the unorganized districts and reservations, the board of county commissioners act as a board of equalization, etc.

Without undertaking to enumerate all the instances in which there is some difference of procedure in respect to property assessed within the organized counties and property assessed in the unorganized districts and reservations, or to

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consider minutely the several objections that are urged to such differences, we do not perceive that the questions suggested are for the courts. Clearly these are matters of detail within the legislative discretion. It is the lawmaking power which is to determine all questions of discretion or policy in ordering and apportioning taxes; which must make all the necessary rules and regulations, and decide upon the agencies by means of which the taxes shall be collected. When, as may sometimes happen, the legislature transcends its functions and enacts, in the guise of a tax law, a law whereby the property of the citizen is confiscated, or taken for private purposes, the judiciary has the right and duty to interpose. But such a case is not presented by this record.

These views dispose of the objections urged against the validity of the act of March 5, 1895, and leave only for consideration error assigned to the action of the territorial board of equalization in adding thirty-five per cent to the assessment or valuation made by the officer or officers to whom the duty to make the assessment is by the statute expressly committed. It is alleged that this order by the board of equalization was unauthorized and void.

We learn from the opinion of the Supreme Court of Oklahoma in the present case that this question of the power of the territorial board of equalization to raise the valuation of the properties to be taxed had been, in the previous case of *Wallace v. Bullen*, decided affirmatively, and that such decision was followed in the present case.

We are informed, however, by the brief filed in behalf of the petitioners that subsequently, on September 3, 1897, in the case of *Gray v. Stiles*, 49 Pac. Rep. 1083, the subject was again considered and an opposite conclusion reached. It is also asserted in said brief that the question is one of general importance, and that a final decision of it may affect the validity of municipal obligations heretofore issued in the Territory.

Such allegations disclose that there are parties not represented before us whose interests are involved in the inquiry. The case was heard in the trial court on a demurrer to the

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petition, and the question of the validity of the action of the board of equalization in raising the assessed values throughout the Territory was put by the Supreme Court, without discussion, on its previous decision in the case of *Wallace v. Bullen*. We are also informed by the briefs that the case just mentioned is now pending before the Supreme Court on an order for a rehearing. Whether the facts pertaining to the action of the board of equalization in this particular were the same in *Gray v. Stiles* as those in this case, we cannot say from this record.

In such circumstances, we think it would be premature for this court to determine the question.

As, for the reasons before given, the judgment of the Supreme Court must be reversed, that court will have an opportunity to deal with this question, if it think fit, upon a rehearing.

*The judgment of the Supreme Court of Oklahoma is accordingly reversed, and the cause is remanded with directions to proceed in conformity with this opinion.*